THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

ALLEN T. KLOTS, *President* | PAUL B. DE WITT, *Executive Secretary* | MANDEVILLE MULLALLY, JR., *Secretary*

THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 10 NOVEMBER 1955 *Number 8*

Association Activities

AT THE STATED MEETING on October 18, Chauncey Belknap, Chairman of the Committee on the Judiciary, reported that upon the Committee's recommendation William C. Hecht, Jr. was found outstandingly qualified for the Supreme Court; found qualified for the Supreme Court were Selma M. Lobsenz Berliner, Henry Epstein, Sidney A. Fine, John L. Flynn, Theodore R. Kupferman, Colemar F. Nichols, David M. Potts, Morris E. Spector, Harold A. Stevens, Francis L. Valente, and Maurice Wahl; Charles M. Lee was found not qualified for the Supreme Court. Gerald P. Culkin and Harry Harris were found qualified for the Court of General Sessions. James M. Barrett and Hyman Bravin were found qualified for the County Court, Bronx County.

Abraham Shamos, Chairman of the Committee on the City Court of the City of New York, reported that upon the Committee's recommendation Birdie Amsterdam was found outstandingly qualified and Paul F. Starace was found not qualified for the City Court, New York County; Peter A. Quinn was found outstandingly qualified and Irving Braff and Louis Schifrin were found qualified for the City Court, Bronx County.

Charles J. Colgan, Chairman of the Committee on the Munici-

pal Court of the City of New York, reported as follows upon the Committee's recommendation regarding Municipal Court candidates: Charles A. Loreto, Joseph G. Josephson, Martin Kraus, Pasquale A. Mele and Murray Koenig were found qualified, and Adolph C. Orlando was found not qualified for the First District, Bronx; Louis G. Andreozzi was found qualified for the First District; Brooklyn; Milton M. Wecht was found qualified for the Second District, Brooklyn; Vincent D. Damiani was found qualified and Joseph A. Giordano was found not qualified for the Fifth District, Brooklyn; Samuel D. Johnson was found qualified for the Seventh District, Brooklyn; John J. Mangan was found qualified for the Third District, Manhattan; Nathaniel Sorkin, Norman S. Fenton, Robert V. Molloy and Sidney Forscher were found qualified for the Seventh District, Manhattan; Carroll Hayes was found qualified for the Ninth District, Manhattan; Joseph A. Bailey and Carson De Witt Baker were found qualified for the Tenth District, Manhattan; Charles J. Vallone and C. Parke Masterson were found qualified for the First District, Queens; and Abraham R. Margulies, Milton Koerner and Benjamin J. Taruskin were found qualified for the Fifth District, Queens.

The above recommendations of the Committee on the Judiciary, the Committee on the City Court of the City of New York, and the Committee on the Municipal Court of the City of New York were approved by the meeting.

The Stated Meeting also approved an amendment to By-law XIII, Section 34. The section now reads as follows:

> 34. A Committee on Corporate Law of twenty-one members and a chairman. It is charged with the duty of considering and reporting to the Association for its information and action on all matters relating to corporation law including the administration of the laws of the United States on the subjects of bankruptcy and corporate reorganizations, including reorganizations not caused by insolvency or inability to pay debts as they mature.

The Committee is charged with the duty of examining proposed legislation pending in the Congress or in the New York State legislature relating to corporations, bankruptcy or corporate reorganizations and proposed rules and regulations pending in any Federal or State court, commission, department or agency on these subjects with authority in the Committee to promote or oppose the same on behalf of the Association when in the judgment of the Committee such action is advisable. It may consider proposals, not so pending, for changes in laws, rules and regulations dealing with corporations, bankruptcy or corporate reorganizations, and any matter related to the administration of such laws rules and regulations, and report to the Association thereon and take such action as the Association may direct. In submitting recommendations to the Association it shall follow the procedure prescribed for the Committee on Law Reform.

An amendment to By-law XIII, Section 30, was approved which increases the number of members of the Committee on the Bill of Rights from fifteen members and a chairman to eighteen members and a chairman.

Professor L. R. Sivasubramanian, Dean, Faculty of Law, University of Delhi, India, was a guest of the Association at the meeting and spoke briefly.

THE FOURTEENTH Annual Benjamin N. Cardozo Lecture was delivered on October 27 by Harrison Tweed. Mr. Tweed's topic was "The Changing Practice of Law." The lecture will be published in the January issue of THE RECORD.

THE SEPTEMBER meeting of the Special Committee on Atomic Energy, Oscar M. Ruebhausen, Chairman, was held in Dedham, Massachusetts, at Massachusetts Institute of Technology's Endi-

cott House. The meeting convened Friday evening at dinner. Dean Edward P. Brooks of MIT's School of Industrial Management welcomed the members to Endicott House. After dinner the following films of generally informative nature were shown: "A is for Atom," "Atoms and Agriculture," "Nuclear Reactors for Research," "The Atom Goes to Sea," and "Dawn's Early Light."

The formal discussion program began Saturday morning and lasted all day. The United States program of Bilateral Agreements for Cooperation was treated under eight topic headings. The evening session was devoted to an address on the Geneva Conference by Oliver Townsend. The Sunday morning session was utilized to summarize the sense of the Saturday meeting, to identify common conclusions, and to explore the implications of ideas presented Saturday. The meeting concluded with lunch on Sunday.

THE FOLLOWING letter from Mr. Harold Riegelman, which was published in the New York Herald Tribune for September 24, 1955, will be of interest to members of the Association:

To the N. Y. Herald Tribune: Two recent editorials in the New York Herald Tribune tend to accent a civic trend of first importance. The editorials concerned the extraordinarily fine work of Bernard Gimbel and his associates in the Convention and Visitors' Bureau and the work of the Citizens Committee to Keep New York City Clean. In both cases you lauded the work of these groups. And so may we all. In fact, the Citizens Budget Commission last June bestowed its medal for high civic service on Mr. Gimbel in recognition of his enormously constructive work for our city.

But underlying all of this is the trend toward the use of civic organizations, civic movements, to achieve specific objectives. This is a sign of a political revolution, really.

Not all revolutions are accompanied by violence and bloodshed, so those who might be alarmed can be assured that nothing disastrous will occur. Revolutions can be gradual, peaceful, and also dynamic as this one is.

* * *

The New York revolution can be described in a dozen ways, all of them true. Here is one: Much of the political action in New York City has been transferred from political parties to nonpartisan civic organizations. Another: Republicans and Democrats vote partisanly in New York elections but

seek to secure beneficial political action by the city government through non-partisan civic organizations.

This is not a new development. It has been evolving gradually for many years. Today the civic organizations are at an all-time peak of prestige and influence. While much credit belongs to city officials whose sense of good public relations is better than it has been in the past, the real credit goes to the New York civic leaders.

Finding that political parties, for good and valid reasons, could not satisfy his need for political action in specific fields of municipal reform, the civic-minded New Yorker is increasingly placing his energy and his purse behind non-partisan, voluntary organizations aimed at definite objectives. In the role of civic workers, New Yorkers are getting political action.

* * *

There are several vital reasons why New York City is made to order for the specialized civic organization.

First, by the very nature of things, the average voter feels as far from City Hall as from the brontosaurus. This may be nobody's fault. Certainly the political partly thinkers have done everything possible to create the opposite feeling. For the moment, let's put it down to the immensity of the City.

Second, the individual political party tends to be publicly active on local issues at elections, not during the quiet months between them.

Third, the number, scope and variety of vital issues that confront New Yorkers are so vast that any political candidate who tried to treat them all in detail would look like an enyclopedia reading upside down and backwards.

Fourth, the presentation of a full-fledged list of civic skull-crackers all at one time around election would serve only to confuse the voters, or for that matter, even the professors of political science.

* * *

Candidates for high office in New York City periodically attempt a serious educational presentation designed to show the broad range of interlocking civic problems. They find this a laudable effort but not necessarily a very fruitful one. This is no snide criticism of the intellectual powers of the voters. The field is so vast that only an electronic brain could keep up with every item on the list. So political parties and political candidates cannot satisfy the need of individuals for sharp delineation of definite civic problems.

The New York City civic organization is, indeed, the town meeting of America, 1955. It is the practical means by which New Yorkers can make themselves felt, make their voices heard. The mailing list of leading active, large civic organizations including chambers of commerce, social welfare and educational groups, that we customarily use in the Citizens Budget Commission numbers 350 groups. It is said that New York City's civic groups, counting neighborhood organizations may number more than 2,500. Nobody really knows how many there are.

Civic interest, one may suggest therefore, is not dead in New York City and those of us who are active in civic organizations have no fears of extinction of our species. Indeed, the very existence of new and more acute civic problems than we have ever before encountered in New York is the best of all possible reasons why we may confidently look forward to a flourishing rise in civic activity, perhaps greater than ever before in our city's history.

It is of utmost importance to remember that active Democrats and Republicans join together in these non-partisan efforts. Often individuals are active in more than one such group.

A glance at the names on the list of civic organizations, reveals the areas of special interest which they survey, day-in and day-out. They are the non-partisan political sentinels of New York municipal administration. They represent a powerful influence in the community.

* * *

As we review their activities—and we frequently do—we find only one flaw and that is the lack of direct participation by what we call, for lack of some other way to define him, The Average New Yorker. We do not know ourselves how he would be isolated for scientific study. But we do know that while our civic groups are representative of the community, the numbers of individuals among their memberships bear no relation to the number of persons living and doing business in New York City. Those who do belong, are the active civic leaders.

The real reason why we do not seem to attract enough "average" New Yorkers to our civic organizations is only partially related to the characteristic of apathy. The answer more likely lies in the fact that civic groups must specialize to live. This is the only way they can be effective and they have to be effective to live. Because they are specialized, they attract persons who are intensely civic-minded and have a keen desire to work or help in specified fields. If they were to diversify their objectives, they would dilute their strength and their identity would become obscured. Their influence would then disappear.

* * *

The idea of broadening the base of New York civic organization is no man's monopoly. Scarcely a voluntary agency in this city has not grappled with it and attempted some definite course of action. Our experience would indicate that instead of pursuing lures of over-simplification and phony, concocted dramatics, we shall all be better off if we do a good, solid, sincere day's work and let the results speak for themselves. This is a serious problem and our next big one, but it will never be solved by high-pressure, smart-aleck tactics.

The non-partisan concern with the welfare of this city epitomized in the city's voluntary civic organizations nowadays is a healthy and promising sign. It means that on basic issues such as health, education, housing, police, fire protection and a host of other services, New Yorkers are working together

to advance our city's interests, regardless of our individual partisan political attitudes.

HAROLD RIEGELMAN
Counsel, Citizens Budget Commission.
New York, Sept. 21, 1955.

THE YOUNG LAWYERS Committee, Harman Hawkins, Chairman, has announced that approximately 87 schools are participating this year in the National Moot Court Competition. These schools are arguing the preliminary rounds in 14 regional contests. It is anticipated that 22 schools will come to New York for the finals of the national competition, which will be held at the House of the Association on December 14, 15 and 16. The New York City Regional Rounds will be held at the House of the Association on November 17 and 18. Participating in the Regional Rounds are Columbia University School of Law, New York University School of Law, Fordham University School of Law, St. John's University School of Law, Brooklyn Law School and New York Law School.

AT ITS organization meeting the Committee on Law Reform, Robert B. von Mehren, Chairman, decided to make a comprehensive study of the federal conflict of interest statutes. The study is being directed by a Subcommittee, of which Lloyd F. MacMahon is the Chairman. The Subcommittee is being assisted by Alexander C. Hoagland, Jr., Fellow of the Association.

THE SPECIAL Committee on the Administration of Justice, of which Francis H. Horan is Chairman, has issued a report on the simplified state-wide court system proposed by The Temporary Commission on the Courts, of which Harrison Tweed is the Chairman. The report, written by John E. Lockwood, a member of the Committee, is directed to the public as well as members of the Bar, and has been widely distributed to judges, legislators and representative community groups. The report is published in this issue of THE RECORD.

The Calendar of the Association for November and December

(As of October 28, 1955)

November	1	Dinner Meeting of Committee on Bill of Rights
		Dinner Meeting of Committee on Increase of Membership (Division 1) Harvard Club
November	2	Dinner Meeting of Executive Committee
		Dinner Meeting of Committee on Increase of Membership (Division 2) Harvard Club
		Meeting of Section on Wills, Trusts and Estates
November	3	Meeting of Committee on Admiralty
		Dinner Meeting of Committee on Copyright
		Dinner Meeting of Committee on Increase of Membership (Division 3) Harvard Club
		Meeting of Committee on Legal Referral Service
		Meeting of Committee on Patents
November	7	Meeting of Section on Corporate Law Departments
November	9	Dinner Meeting of Committee on Administration of Justice
		Meeting of Committee on Domestic Relations Court
		Dinner Meeting of Committee on Professional Ethics
		Meeting with Legislative Adviser
		Dinner Meeting of Committee on Improvement of Family Law
		Meeting of Committee to Cooperate with International Commission of Jurists
		Meeting of Section on Litigation
November	10	Dinner Meeting of Committee on Study of Anti-Trust Laws and Foreign Trade
		Meeting of Entertainment Committee
November	14	Meeting of Joint Committee on Contingent Fees
		Dinner Meeting of Committee on Military Justice
November	15	Meeting of Section on Administrative Law
November	16	Meeting of Committee on Admissions
		Dinner Meeting of Committee on Foreign Law
		Dinner Meeting of Committee on Courts of Superior Jurisdiction
		Meeting of Section on Trade Regulation

November	17	New York City Regional Moot Court Competition. Sponsorship Young Lawyers Committee
November	18	New York City Regional Moot Court Competition. Sponsorship Young Lawyers Committee
November	21	Meeting of Section on Banking, Corporation, and Business Law Meeting of Library Committee
November	22	*Lecture by Hon. Samuel H. Hofstadter of the Supreme Court of the State of New York, 8:00 P.M. Buffet Supper, 6:15 P.M.*
November	28	Meeting of Section on Corporate Law Departments Dinner Meeting of Committee on Real Property Law
November	29	Meeting of Section on Labor Law Dinner Meeting of Committee on Law Reform
December	1	*Round Table Conference, 8:15 P.M. Guest to be announced.* Dinner Meeting of Committee on Taxation
December	5	Dinner Meeting of Committee on Domestic Relations Court Dinner Meeting of Committee on Medical Jurisprudence Dinner Meeting of Committee on Professional Ethics Joint Meeting of Section on Jurisprudence and Comparative Law in collaboration with Parker School of Columbia University
December	6	Dinner Meeting of Committee on Bill of Rights Meeting of Section on Wills, Trusts and Estates
December	7	Dinner Meeting of Executive Committee
December	13	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
December	14	National Moot Court Competition. Sponsorship Young Lawyers Committee
December	15	National Moot Court Competition. Sponsorship Young Lawyers Committee
December	16	National Moot Court Competition. Sponsorship Young Lawyers Committee
December	19	Meeting of Library Committee Dinner Meeting of Committee on Courts of Superior Jurisdiction
December	20	Dinner Meeting of Committee on Real Property Law
December	21	Meeting of Committee on Admissions Meeting of Committee on Foreign Law

The Citizens and the Courts

A REPORT BY THE SPECIAL COMMITTEE ON THE ADMINISTRATION OF JUSTICE ON A PROPOSED SIMPLIFIED STATE-WIDE COURT SYSTEM

PRESENTED BY A SUBCOMMITTEE OF THE TEMPORARY COMMISSION ON THE COURTS

A subcommittee of The Temporary Commission on the Courts, under the Chairmanship of Louis M. Loeb, has made public under date of June 17, 1955 a proposal for simplifying and unifying the court system of this State.

This proposal is for a sweeping reorganization of the existing court system to be accomplished largely by a substantial revision of the State Constitution. It does not specify the legislation that would have to be enacted if the Constitutional amendments should be adopted, although the framework of that legislation is indicated. (Appendix A to this report contains a summary of the proposal.)

Since what we have before us is a fundamental proposal for a basic change in court structure, we believe the subcommittee was wise in limiting its recommendations to Constitutional change and broad outlines, and postponing, for the present, a host of details, important though they are. This Committee will similarly limit its report, and will take up separately with the subcommittee such suggestions on matters of detail in the subcommittee's proposal as have concerned us. We deal here only with the plan as a whole. Since Constitutional changes must be voted upon both by the Legislature and the people in a State-

---

Editor's Note: The Special Committee on the Administration of Justice was appointed on November 5, 1952 and has been engaged for three years in studying and making reports and recommendations on the Courts and their administration. It has been assisted by a staff made possible through the generosity of the New York Foundation and John D. Rockefeller, 3rd, who have made grants to the Association of the Bar Fund to enable it to carry forward its primary purpose of aiding the Association "to facilitate and improve the Administration of Justice."

wide election, this report is written both for the public and members of the Bar, and will review the plan from the point of view of its impact upon the citizen.

1. THE CITIZENS' INTEREST IN THESE RECOMMENDATIONS

It is a commonplace to say that today the law affects almost every aspect of the citizen's life. In much of what we do we are governed by the law without being conscious of the fact. This is because we act within it and abide by it without realizing that we are doing so. As a matter of fact, the Consolidated Laws of the State of New York comprise 67 chapters and, together with the Criminal Code and Unconsolidated Laws, make up more than 66 volumes on a lawyer's bookshelf. In addition, there are other statutes and the regulations and ordinances of countless municipalities and administrative agencies.

The citizen is reasonably conscious of the processes by which these laws are put on paper by the Legislature because the legislative sessions are public and fully covered by the press and other news agencies, but, unless he becomes involved in litigation, he is far less aware of the vital process by which these laws are applied. It is the courts that apply the laws and, in applying them, interpret them. Except in certain sensational cases which catch the headlines, this process of application is not well understood by the average citizen, although he has an immense stake in that process. If it does not function properly, the laws passed by the Legislature become distorted or nullified and justice is not done. If a citizen must wait for years before he can get his hearing in court, if the affair is so complicated and expensive that the citizen cannot afford it, the purpose of the legislation is nullified and justice is not done. If the press of business is such that some cases cannot be given full and careful consideration, justice may not be done.

It is vital to every citizen that full justice be available to all promptly, efficiently and economically.

Further, the judicial system costs tens of millions of dollars a year. This money comes out of the pockets of the citizens. If they cannot even find out how much it does cost, if the system is full of waste and duplication, all citizens should be deeply concerned.

2. THE INGREDIENTS OF JUSTICE FOR THE CITIZEN

What does the citizen expect and what is he entitled to receive from his courts? The answer is "justice" in the broadest sense of the word.

There are three basic ingredients of justice. These are good laws, good judges, and a good court system within which the judges can be effective. Neither the Temporary Commission nor this Committee is considering the quality of our laws. Both the Temporary Commission and this Committee are deeply concerned with the other two, namely, good judges and an efficient court system.

The Temporary Commission has announced that it will hold hearings at a later date on the question as to how judges should be selected. Accordingly, with one important exception to be discussed later, this Committee will not, at this point, express any opinion on this question. The quality of the judges is of the very greatest importance to every citizen, but what we are dealing with here are the requisites of an effective court system.

3. THE REQUISITES OF AN EFFECTIVE COURT SYSTEM

In our judgment there are three essential requisites of an effective court system. These are jurisdictional unity, administrative unity, and fiscal unity.

A. *Jurisdictional Unity*

If a citizen has a case under the law, he should be able to go to court and get that case decided. He should not have to run the risk of finding that he has gone to the wrong court or of finding that he has gone to the right court but that it can decide only a part of the controversy, so that there must be other proceedings

in other courts. Today, there are many different courts, each dealing with different kinds of cases, and having no power to deal with any other cases. It is not sufficient to say that the citizen will be represented by a lawyer and that the lawyer should be able to pick the right court. Where jurisdictional lines are rigid, the case may be brought in the wrong court because of facts that do not appear until later. To be sure that he is going to the right court the lawyer may have to engage in considerable research involving unnecessary expense to his client. Furthermore, no lawyer can solve the difficulty that arises so frequently in cases involving family problems where there just is no one court competent to handle all phases of the case. This may necessitate bringing several different proceedings in several different courts, multiplying the expense to the parties.

We believe that to achieve jurisdictional unity would be a long step toward the improvement of justice for the citizens of this State.

B. *Administrative Unity*

If the average citizen is only dimly aware of the process by which the courts apply the laws to concrete cases, he is probably far less conscious of the administrative processes of the court system.

How is it decided which judge will hear his particular case? What happens if the judge to which his case is assigned is very busy but some other judge has little to do? Can the case be transferred to the judge who is not so busy?

What about the supporting staffs of legal assistants, court clerks, probation officers, etc.? Are they equally available to all the judges according to their needs or are they locked up in tight compartments so that one judge may have too many, another not enough or none at all?

What about salaries and working conditions? Are they uniform or are they different?

How about purchasing of supplies? Is there some central control?

How about the service charges made by the courts? Are these uniform?

These are just samples of the questions that might occur to one who wanted to know about the administration of the court system. They have direct bearing on the efficient functioning of the judges. If some judges are overworked while others do not have enough to do, justice will suffer. If judges have to devote too much of their time to administrative matters or to doing things themselves which assistants should do for them, justice will suffer.

By administrative unity this Committee means a system of administration which, so far as practicable, will assist each judge adequately and uniformly according to his needs and will relieve the judge so far as possible from unnecessary chores that others should do for him.

Such a system will equalize work loads and bring the services of judges and other court personnel to bear where needed.

c. *Fiscal Unity*

There should be one budget for the judicial system. The citizen is entitled to know what that system costs. The Legislature, in voting to supply the money, should be able to find out what it is voting for. A single over-all budget would also be an instrument for attaining administrative unity. The two go hand in hand.

Such a budget should cover all courts and judges. One court should not have to go to the Legislature for its funds and another be free to set its own budget and demand that the funds be supplied, as is presently the case with some of our New York courts.

These three unities are closely related. An efficient court system should have all three.

4. THE PRESENT COURT SYSTEM IN NEW YORK STATE

Applying the standard of the three unities which this Committee believes to be essential ingredients of an efficient judicial

system, it finds that the present system in this State contains none of them.

Originally, back in 1846, when the basis of our present court system was established, there was a high degree of jurisdictional unity. In those days, when there were poor communications and life was far simpler than it is today, administrative and fiscal unity were neither possible nor as necessary as they are today. We started with a simple unified court system, and a decentralized autonomous administrative and fiscal system.

During the intervening years, as communications improved and life became increasingly more complex, we added year by year a myriad of specialized courts with special and limited jurisdiction, thus getting further and further away from the ideal of jurisdictional unity. Only very recently have we made a start toward administrative and fiscal unity with the passage of the Judicial Conference Bill sponsored by The Temporary Commission on the Courts. But this measure can have only limited effectiveness so long as the present jurisdictional hodge-podge continues.

(Appendix B to this report sets forth the history of the development of the court system in this State.)

A. *Jurisdictional Unity*

How does our present court structure compare with the ideal of jurisdictional unity? It can be said that if an expert lawyer were hired for the express purpose of devising a system that would defeat that ideal, he would be hard put to make the present structure worse. This complete lack of jurisdictional unity is a contributing cause to the fact that there are more courts with excessive delays in this state than in any other State of the Union, or for that matter, than in any English speaking nation. It is incredible to realize that a citizen of this State may have to wait as long as five years before his case is decided, despite the fact that speedy justice is one of the most basic guarantees which a citizen has a right to expect from his government.

In New York City alone there are eleven different trial courts sitting on any particular day. Every one of these has a different jurisdiction. Elsewhere in the State you may have sitting in a given County the Supreme Court, the County Court, the Children's Court, the Surrogate's Court, the Court of Claims, and assorted City Courts, Police Courts, and Justices of the Peace. All these courts have different jurisdictions. Courts bearing the same name differ in jurisdiction; courts having identical jurisdiction bear different names. Sometimes the jurisdictions of different courts overlap; sometimes authority over a single situation is so divided among a number of courts that no just result can be reached by any of them. Nowhere is this fragmentation of jurisdiction more damaging to the cause of real justice for the citizen than in the field of problems relating to children and families, yet no problems are more important for the citizen, and none touches so close to his daily life. The Gellhorn Study and the Report of the Committee on the Study of the Administration of Laws Relating to the Family, published by that committee of this Association in 1954, make this very clear. (Appendix C contains a brief extract from this report.)

B. *Administrative Unity*

This Committee has already through its publication "Bad Housekeeping" presented fully its findings regarding the administrative chaos in the courts of this State. There is no administrative unity. As we have already said, the new Judicial Conference makes only a beginning at the solution to this problem. It cannot achieve administrative unity and efficiency while the court system itself is chaotic. It is a forward step, but cannot supply the complete answer.

The problem of administrative unity is intimately bound up with the problem of jurisdictional unity. As long as there is a chaos of courts, unity and efficiency of administration is very difficult to achieve. The point of beginning is a simplification and unification of the courts themselves.

c. *Fiscal Unity*

The fiscal chaos of our court system rivals the administrative chaos. This Committee, despite extensive efforts, has never been able to determine exactly how much our court system costs. We know that it runs into tens of millions. Part of the cost is paid by service charges to the citizen for the use of the courts; part is paid by the State, part by cities, counties, and municipalities.

There is no uniformity as to service charges, salaries, budgets. There is no general control over them. Some courts can even set their own budgets and compel the appropriating authority to grant the money. Just as in the case of administration, fiscal unity should begin with the unity of the courts themselves.

The problem that New York State faces today is not new. It has been growing more and more serious for many years. At various times civic leaders and this Association have attempted to promote reform. Each time these attempts have failed. And, with each failure, the situation has grown worse.

Nor is this situation peculiar to New York State. It is a common problem across the nation. In many states, efforts are now going forward to produce remedies. (Appendix D to this report contains a resume of these efforts during 1955.)

5. THE TEMPORARY COMMISSION AND ITS SUBCOMMITTEE'S PROPOSALS

The Temporary Commission was appointed by the Governor of this State in 1953. It consists of distinguished members of the Legislature and the Bar. It has the assistance of able staff members. It has been engaged in studying these problems of our judicial system with great devotion.

The present proposal is the most far-reaching and important that the Temporary Commission has yet considered. The essential fact about this proposal is that it provides for full jurisdictional unity. It cuts through the chaos of specialized courts. It provides for a basic system of two trial courts and two appellate courts. To this it adds a Magistrates' Court to handle relatively

minor criminal matters. Although the two courts—the Superior and the District Court—would have different jurisdictions, there would be jurisdictional unity because cases would be freely transferable between them. The citizen would no longer find himself in a position where no court could handle his entire problem. Nor would he, if he found himself in the wrong court, have to start all over again—the case could be immediately transferred to the right court.

The differences between conditions under the present system and under the proposed system are: 1. Under the present system, cases are held up for years in some courts while in others the judges do not have sufficient work to occupy them on a full-time basis; under the proposed system, judges would be freely assigned where needed. 2. Under the present system, confusion frequently exists as to which court should deal with a problem. This results in increased expense to those who must pay lawyers to resolve this confusion, in increased expense to the citizens who, through taxes, must pay judges to determine jurisdictional questions, and in increased delay in the trial of cases due to the necessity of diverting judges to pass upon jurisdictional questions. Under the proposed system, no jurisdictional questions of this nature would exist. 3. Under the present system, additional expense results to both the parties and the public where proceedings in more than one court are necessary to deal with the same subject matter. Where more than one judge is compelled to spend time in going over the same subject matter, the waste of judicial manpower greatly contributes to delay in the trial of other cases. Under the proposed system, there will be no jurisdictional lines to make multiple proceedings necessary. 4. Under the present system, as the procedure of every court differs to some extent from that of every other court, procedural complexities are multiplied. In Westchester County there are six different City Courts, as well as the County Court and the Supreme Court, where an automobile negligence case might be brought, and procedure differs in each court. Lawyers need more time to deal with these additional procedural problems, and this time has

to be paid for by their clients. Under the proposed system, the lesser number of courts would go far to eliminate this trouble.

The jurisdictional unity supplied by this proposal would result in less cost to the taxpayer, less cost to the parties, and less delay in providing justice for our citizens. It would also make possible, through appropriate legislation, the administrative and fiscal unity which are necessary to give this State a modern and efficient judicial system.

As we have previously said, the quality of the judges is the most important ingredient of a judicial system. That our present system works as well as it does is a great tribute to the judges who serve us, many of whom have devoted time and energy to administrative problems and reforms far beyond the call of duty. One of the problems this Committee faces is that in pointing to the weaknesses of the system it may appear not to pay proper tribute to the loyal judges and their staffs who manage to keep the rickety machine going. Wisely, we believe, it is proposed to retain all of the judges now in office. They will become judges of the new court system. Thus their talents and experience will be preserved for the service of the State and the citizen.

It is also clearly contemplated that there will be established specialized divisions within the Superior Court and District Court. Thus, although jurisdictional lines will no longer exist to hamper or frustrate justice, there will be areas of specialization—as well there must be in this complex world. However, the existence of specialized divisions within the Superior and District Courts poses a definite problem in connection with the selection of judges for these courts.

Under a specialized court system such as exists today in this State judges are chosen for specialized courts. Thus it is possible for those responsible for their designation and for civic and Bar associations to consider the qualifications of the candidates in relation to a specialty—whether it be criminal justice, domestic relations or the handling of the estates of those who have died. Under the proposed unified general court some at least of this specific identification of the candidate with a particular kind of

court will be lost. Thus there would be a need for some sort of machinery to indicate the type of candidate required by the Superior or District Courts when it became necessary to fill a vacancy.

Since this problem is part of the larger problem of selection of judges, it is too early to propose a definite solution. This Committee, however, is of the opinion that the problem is susceptible of solution and, therefore, the existence of this problem does not affect its full endorsement of the proposal under consideration.

If the basic plan embodied in the proposal of the subcommittee is adopted, the stage will be set for the adoption of the legislation which will complete the task. With this, New York State will for the first time in a century have a judicial system adapted to modern needs and able to give to its citizens the efficient administration of justice to which they are entitled. This Committee welcomes this far-reaching proposal. It believes that every citizen will welcome it also and should lend it his support.

FRANCIS H. HORAN, *Chairman*
ALLEN T. KLOTS, *President of the Association, ex officio*
MANDEVILLE MULLALLY, JR., *Secretary of the Association, ex officio*
EDUARDO ANDRADE
PORTER R. CHANDLER
WILLIAM C. CHANLER
EDWARD S. GREENBAUM
HAROLD M. KENNEDY
JOHN EDWARDS LOCKWOOD
ALFRED P. O'HARA
RICHARD J. POWERS
JOSEPH A. SARAFITE
STUART N. UPDIKE

ALBERT R. CONNELLY, *Liaison member of the Executive Committee*

October 3, 1955

APPENDIX A

NEW COURT STRUCTURE

PROPOSED BY THE SUBCOMMITTEE ON MODERNIZATION AND SIMPLIFICATION OF THE COURT STRUCTURE TO THE TEMPORARY COMMISSION ON THE COURTS

This proposal is that a new Judiciary Article of the State Constitution be adopted, providing for five statewide courts, replacing the present courts, to exercise all the judicial power of the State (save for Indian courts in Indian reservations). These five courts would be:

THE SUPREME COURT OF APPEALS

The highest court, essentially a continuation of the present Court of Appeals.

THE APPELLATE COURT

The intermediate appellate court, divided into the same four departments as the present Appellate Division, and essentially the successor to that court. It would be empowered to sit in sections or panels as volume of business might require. Appeals from this court would go to the Supreme Court of Appeals.

THE SUPERIOR COURT

A trial court with general unlimited jurisdiction, both civil and criminal, organized on a county basis with at least one judge in every county (except Fulton and Hamilton). It would take over the business of the present Supreme Court, Court of Claims, County Courts, Children's Courts, Surrogate's Courts, and, in the City of New York, the Court of General Sessions, the City Court, and the Domestic Relations Court. It would be divided into such divisions specializing in particular matters—a probate division, a criminal division, a family and children's division—as might be needed in a given county. (The proposed family and children's division would establish within the integrated court system the long-sought comprehensive handling of these matters.) Judges would be assigned to divisions for which they have special aptitudes, but would be empowered to decide, if that proved desirable, any question arising in any case properly before them, without needing to refer it elsewhere.

Appeals from this court would be to the Appellate Court, except in certain cases (such as first degree murder convictions) where direct appeal is allowed to the Supreme Court of Appeals.

Appellate Terms of the Superior Court, held by one to three judges, would be established to hear certain appeals from lower trial courts.

THE DISTRICT COURT

A trial court hearing misdemeanor charges, landlord and tenant cases, and civil cases (other than family or probate matters) in which the demand is under a specified amount (the amount to be subject to change by the Legislature or by court rule), and all cases transferred to it by the Superior Court. The District Court would largely take over the jurisdiction of the present District Court of Nassau County, the Municipal Court and the Court of Special Sessions in New York City, the various courts in other cities, and the civil jurisdiction of Justices of the Peace and village Police Justice Courts. It would be organized in districts, each county (except Fulton and Hamilton) comprising at least one district. Where necessary, it would have specialized divisions—criminal, small claims, landlord and tenant, and so forth.

Appeals would go to the Appellate Court, save that the appellant might have the option to appeal to the Appellate Term of the Superior Court in certain specified less serious cases, and certain rare constitutional questions would go to the Supreme Court of Appeals.

THE MAGISTRATES COURT

A trial court for traffic violations and offences below the grade of misdemeanors, such as violations of local ordinances or fish and game laws. It would take over the criminal jurisdiction of the present Justices of the Peace, village Police Justice Courts, the City Magistrates' Courts of the City of New York, and inferior criminal courts in other cities. Magistrates would act as committing magistrates in cases to be tried in the Superior or District Courts.

Appeals would be to the Appellate Term of the Superior Court, except in case of certain rare constitutional questions.

The Legislature could abolish the Magistrates' Court in any or all counties, their functions to be assumed by the District Courts.

ADDITIONAL FEATURES OF THE PROPOSED STRUCTURE

1. *Flexibility:* Provision may be made for the transfer of cases from the District Court to the Superior Court, or vice versa, and for assignment of judges to other courts than those in which they normally sit, as press of business may require. This will aid in reducing the present excessive delay in hearing cases in many of our courts.

2. *Full-time Judges:* All judges, except magistrates in certain less densely populated areas, would give full time to judicial work, and could not practise law.

3. *Administration:* General administrative authority over all courts would be vested in such judge or body of judges as the Legislature shall designate. This would give the State its long-needed central administration of the courts. The simplified system proposed would also be simpler to administer.

4. *Costs and Financing:* The State Treasury would pay all costs, subject to such reimbursement from counties, cities and towns as the Legislature may provide. This would provide a single budget and uniform fiscal and accounting procedures which should lead to economies, and for the first time enable us to know what our courts cost.

5. *Procedure:* The Legislature would have power to regulate procedure, but may delegate this power to a court or body of judges. Such delegation has occurred in many states, and has resulted in improved rules of procedure and more just application of these rules by the courts.

6. *Selection of Judges:* All judges are required to be members of the bar. It is tentatively proposed, subject to the findings resulting from later hearings to be held on the subject, that all judges be elected, except that:

(a) Judges of the Appellate Court would be appointed by the Governor from among the judges of the Superior Court elected in that department.

(b) Magistrates would be appointed by the County Boards of Supervisors or other appropriate county officer or body, except in New York City, where the Mayor would appoint.

7. *The Transition Period:* All present judges would be taken into the new courts, and, where possible, court personnel would be taken in also. Where an excess of judges or personnel results, positions becoming vacant (by death, retirement, expiration of terms, and so forth) would not be filled until the excess is eliminated.

APPENDIX B

HISTORY OF THE DEVELOPMENT OF THE NEW YORK COURTS

The following material is taken from pages 23–28 of Bad Housekeeping—The Administration of the New York Courts.*

"Our court system does not represent the evolution of any plan for a single unified state-wide court. Quite the contrary—it is the result of accidental historical growth, of successive additions and alterations in response to im-

* A more detailed resume is to be found at pages 1–18 of Problems Relating to Judicial Administration and Organization, IX New York State Constitutional Convention Committee, 1938.

mediate and compelling demands caused by a continuing increase in the volume of judicial business. From the era of colonization of this state to the present day, there has been an almost complete absence of over-all planning for future judicial needs. From time to time attempts at major reorganization and simplification of the court system have been made. They have generally failed. The consequence has been complication without permanent solution. Some idea of this more or less helter-skelter evolution of our court system is contained in the summary which follows.

Early Development of the Courts of New York

In the first New York State Constitution of 1777, there was no specific provision with respect to the Supreme Court. Legal commentators have said that the effect of the first Constitution was to continue in existence the Supreme Court as it was established by the Colonial Assembly in 1691. At that time, the Supreme Court was patterned after the English courts, consisted of five judges, and had jurisdiction over all civil, criminal and mixed pleas. Equity jurisdiction was separate and belonged to the Court of Chancery.

By 1821 public dissatisfaction with the work and conduct of several of the Supreme Court justices then sitting, plus the inability of the Supreme Court and the local county courts to handle the increased volume of litigation, brought about several reforms. The second Constitution, of 1821, reduced the number of Supreme Court justices from five to three, and its jurisdiction was limited to hearing common law appeals from the newly created circuit courts. In its new role the Supreme Court operated somewhat along the lines of our present Appellate Division.

To keep up with the judicial needs of the rapidly expanding commercial activities of the state, a new court, the circuit court, was established to replace the Supreme Court. The state was divided by the 1821 Constitution into eight circuits to each of which a circuit judge was appointed by the Governor and the Senate. The circuit judges were given the powers of a justice of the Supreme Court at chambers, in the trial of issues joined in the Supreme Court and in Courts of Oyer and Terminer and Gaol Delivery.

The circuit courts were also given equity jurisdiction in local matters; but efforts to abolish the Court of Chancery failed.

Only Attempt at Integration of Courts

In 1846 a thorough-going reorganization of the court system of the state was planned. This was the result of the spirit of Jacksonian democracy which prevailed in the early nineteenth century and of the consequent interest of the 1846 Constitutional Convention in making the judiciary more directly responsible to the people of the state. There was also a genuine desire for unification of the courts, particularly the circuit courts, to eliminate the numerous conflicts between the decisions of the various circuit courts which had made reversals on appeal commonplace. It also seemed essential to do something about the lack of consistency in the final appellate decisions of

the unwieldy and lay-dominated Court of Correction of Errors, which was no more than the Senate sitting as the court of last resort. The solution of all these problems was seen to lie in merging all the state courts into a single set of courts.

The 1846 Constitution for the first time declared that 'there shall be a supreme court, having general jurisdction in law and equity,' and thereby created what is in effect our present Supreme Court. It divided the state into eight judicial districts, designated four justices of the Supreme Court to each district, and abolished the circuit courts. The Court of Chancery was also abolished and its jurisdiction was transferred to the Supreme Court. The justices of the Supreme Court were given full power to preside at circuits, at special terms, and at General Terms (corresponding to the present Appellate Division).

The powers of the old Supreme Court and of the circuit courts were merged into one system, administered by one set of judges. The Supreme Court was intended to be one statewide court and not a number of courts administering justice independently by judicial districts. Under this new court system, the Supreme Court ceased to be stationary, since circuits at special terms and general terms were to be held in each county and an opportunity was thus afforded to dispose of both law and equity business, with the right of appeal to a General Term in the same district.

The four justices of the Supreme Court in each judicial district also served as a General Term of the Supreme Court to hear appeals from the Supreme Court in that district. Appeals from the eight General Terms went to a newly constituted Court of Appeals which was composed of eight judges, four elected for eight-year terms, and the other four being the four Supreme Court justices with the shortest remaining terms. The Court of Appeals replaced the old Court of Correction of Errors as the highest appellate court with the primary function of insuring that a unified body of law was applied in all the General Terms of the Supreme Court.

The 1846 Constitution also provided, for the first time, for the election of justices of the Supreme Court by the voters of the respective judicial districts instead of appointment by members of the legislative and executive branches of the state government. The term of office was limited to eight years to bring more immediate response to public opinion.

The proposal to integrate the county courts into the revitalized Supreme Court failed by one vote at the convention.

1867: Congestion Leads to Complication

Although the 1846 reformers had succeeded in unifying the circuit courts and the Court of Chancery into one court, they could neither abolish the county courts nor amalgamate them into the new state-wide system. The efforts to do so resulted only in cutting down the jurisdiction of the county courts to minor criminal cases. The Supreme Court soon became overcrowded with minor civil matters which could well have been handled by

local courts. The result was a swing to the view that civil jurisdiction should be returned to the county courts, even though it would be inconsistent with the basic concept of a single state-wide court of original jurisdiction. The movement culminated in the adoption by the 1867 Constitutional Convention of an amendment granting civil jurisdiction to the county courts in cases involving amounts up to $1,000.

The fact that under the 1846 system the Court of Appeals heard appeals from eight different General Terms also led immediately to congestion of that court's docket and consequent delays in hearing arguments and rendering decisions. This ineffectiveness was further aggravated by the annual turnover of at least one-half of the court's personnel. To facilitate coordination of the General Terms, the Constitutional Convention of 1867 redivided the state into four departments and reduced the number of General Terms to four, one for each department. To stabilize the membership of the Court of Appeals, the 1867 Constitution provided that it should consist of seven members to be elected in state-wide elections for terms of fourteen years. And finally, to relieve the existing congestion, the four elected judges of the old Court of Appeals, plus one additional judge, were appointed in 1870 a Commission on Appeals with the function of cleaning up the cases pending in the old Court of Appeals.

1894: Birth of the Appellate Divisions

The Commission on Appeals provided some immediate relief until it was discontinued in 1875. The number of appeals to the Court of Appeals did not diminish—especially after the creation of a Fifth General Term in 1882. Consequently, between 1889 and 1892 a Second Division of the Court of Appeals (composed of transferred Supreme Court justices) was established and given equal jurisdiction with the Court of Appeals. But this two-headed judicial creature only led to additional problems. Both parts of the court decided the law independently and at times inconsistently; in addition, a good deal of jockeying by the bar took place to get into whichever of the two appeared more advantageous. An 1889 amendment to the Constitution, permitting the Governor to assign up to four Supreme Court justices to help out the Court of Appeals, did not seem to provide adequate relief.

Since makeshift arrangements to increase the capacity of the Court of Appeals had not been successful, a new approach to the problem of congestion in that court was made in the 1894 Constitutional Convention. The convention concentrated on restricting the number of appeals and on strengthening the intermediate appellate courts.

The 1894 Constitution substituted four Appellate Divisions for the previous five General Terms of the Supreme Court. It was hoped that these separate Appellate Divisions (with seven judges in the First Department and five each in the other three departments—all designated by the Governor from the Supreme Court bench) would become courts of last resort in the majority of cases, so that the Court of Appeals might concern itself, in the main, only with coordinating the law applied by the Appellate Divisions.

This constitutional revision specifically limited the jurisdiction of the Court of Appeals to questons of law arising out of final orders or judgments, with but a few exceptions (e.g., in case of death sentence in a criminal case). Moreover, to relieve possible congestion in the lower courts, the Appellate Divisions were given the power to assign the Supreme Court justices to special and trial terms, and to transfer appeals from one department to another if overcrowding existed.

To further simplify the appellate court structure, several local courts which possessed limited appellate jurisdiction were eliminated and amalgamated into the Supreme Court. For example, the Superior Courts of New York and Buffalo, the New York Court of Common Pleas, and the City Court of Brooklyn were merged into the Supreme Court. Appellate Terms of the Supreme Court were later created to hear the appeals from local courts which had previously been heard in these merged appellate courts.

As a result of the transfer of the eighteen judges of these courts to the Supreme Court, and the addition of twelve new justices, the total number of the Supreme Court justices became seventy-six. But no similar advance was made in integrating trial courts. Indeed, the civil jurisdiction of the county courts as well as the City Court of New York City was increased to $2,000, and the local trial courts were still quite numerous."

"Since the adoption of the 1894 Constitution, the Court of Appeals as the court of last resort, the Appellate Division as the intermediate courts of appeals, the Supreme Court as the State-wide court of unlimited original jurisdiction, the County Courts, Surrogates' Courts, Courts of Justices of the Peace, and inferior local courts of legislative creation, have remained as the framework of the judicial system."*

While a great many additional proposals for simplification of the court structure have been made from time to time, none have come close to fruition. The general types of suggestion and the arguments for and against were well set forth by the Constitutional Convention Committee of 1938.**

Appendix C

THE NEED FOR MATTERS CONCERNING CHILDREN AND THE FAMILY TO BE DEALT WITH BY A SINGLE COURT

The evils of fragmentation of jurisdiction are manifest in their worst aspects in the courts in New York City dealing with children and families. This Association's Special Committee on the Study of the Administration of Laws

---

* Problems Relating to Judicial Administration and Organization, IX New York State Constitutional Convention Committee, 1938, page 13.

** ibid, pages 1087–1177.

Relating to the Family reported: "Our study has also revealed almost unanimous agreement on the undesirability of the present fragmentation of jurisdiction over these different related problems between so many unrelated courts. In many instances the court to which the case is first brought will turn out to be the wrong court. In many instances the right court can give only partial relief to a situation which originates in a common underlying cause that manifests many symptoms each of which is now treated in a different court. If a drunken husband beats his wife she can bring him before a Magistrate's Court and if the Magistrate sees fit he may be sent to jail, but the Magistrate cannot enter an order of protection. If the wife also needs support, she cannot get it from the Magistrate but must go to the Family Court which can enter an order of protection in connection with an order of support. To secure a permanent separation decree, however, she must go to the Supreme Court where the usual requirement of counsel makes the proceeding unavailable for all practical purposes to the poor. The Family Court has jurisdiction only in support cases and then only if the couple have been married. For support of a child born out of wedlock the mother must go to the Court of Special Sessions, whereas if the question of support arises in connection with a divorce, separation, or annulment, only the Supreme Court has jurisdiction. Matters involving the custody of minor children may require disposition by either the Family Court, the Children's Court, or the Supreme Court, depending on the nature of the case. Delinquency involving children under sixteen is handled in the Children's Court; but if a minor over the age of sixteen commits an identical offense, or is wayward, he may be tried in any one of a number of different courts, depending on the nature of the charge, the special procedure involved, and the county in which the crime is committed. Various members of the same family will find themselves from time to time in each of several courts on different charges and there are certain families whose members reappear frequently in one or more of these courts. Yet in cases of the above types presently handled by different courts whether the specific issue be of civil or criminal nature, there usually exists a central cause and origin. Proper disposition requires that the whole family fabric with all its torn and tangled strands be viewed as an integrated whole and in one tribunal. In many instances the records of one court dealing with one fragment of the problem may not be available to another handling another fragment. Because some of these courts are not courts of record the decision in one court may not be res judicata in another court. A couple may be found to be unmarried and the child illegitimate by the Court of Special Sessions and the same couple and the same child may be found to be married and legitimate by the Domestic Relations Court.

Such a splitting-up of jurisdiction is not only illogical and meaningless but makes for inefficiency and injustice. Even the practicing lawyer is confused by the fragmentary distribution of jurisdiction in these matters. It can be imagined in what a bewildered state a poor woman, seeking relief of one kind or another, must find herself if she cannot afford to invoke the aid of counsel. This jurisdictional hodgepodge has caused the people in this com-

munity least able to cope with it to be knocked around in the courts as if in a pinball machine."*

While this confusion is most extreme in New York City, it is by no means limited thereto. Judge Bodine, County Judge, Surrogate, and Judge of the Children's Court in Seneca County, has testified:

> "I am continually colliding with the Supreme Court in marital cases and in questions of custody of children. That is my biggest difficulty. I am sure it is a problem of any Children's Court judge in New York State outside of the Metropolitan district. My facilities in the Children's Court are very limited. We have a Child Health Clinic that comes through the county every week or two but I have no probation officer, no psychiatrist, but of course I can obtain the services of a physician if necessary. I feel that the Children's Court and the Marital Court should be combined in some way, perhaps not on a county-wide basis, either, but rather on a district basis so that adequate investigation could be made of each and every case and appropriate disposition made."**

APPENDIX D

COURT CONSOLIDATION MOVES IN OTHER STATES

The problems created by an antiquated judicial system attempting to operate in the complex society of today are not peculiar to New York State. In recent years efforts have been made in many states to bring about judicial reform. These efforts have largely involved attempts to modernize and simplify court structures. It has been recognized that the inefficiency, expense, and delays of existing court systems are to a large extent the result of a lack of jurisdictional unity.

As indicative of the activity in this area, sixteen separate bills dealing with this problem were introduced in the legislatures of ten different states in 1955 alone. The following information compiled by the Institute of Judicial Administration sets forth state action in this field during 1955.

CONNECTICUT

H.B. 1083, which would have the effect of combining the superior court and the court of common pleas, *died* in committee. The proposed plan was advocated by the Connecticut Judicial Council as a measure which would bring about centralization and economy of service.

Sen. B. 52, providing for a unified court system by proposing to establish an

---

* Children and Families in the Courts of New York City, pages 7–9.

** Record of Public Hearing of The Temporary Commission on the Courts, June 30, 1954, pages 138–9.

integrated court consisting of five divisions with consequent lower court consolidation, *died* in the House, after Senate passage.

Sen. B. 823, which would do away with the present system of town courts and establish district courts with limited criminal and civil jurisdiction, *failed* to pass.

ILLINOIS

Sen. J. Res. 17 (H. J. Res. 16), the proposed new Judicial Article, providing for a modernized court structure consisting of a Supreme Court and circuit and appellate courts, centralized administrative authority, new retirement provisions, and a non-political method of selecting judges, *failed* to pass. Under heavy fire was the proposed non-political method of selecting judges, notwithstanding that the proposal had been changed to permit a separate vote by the people on this question. A renewed attempt to effect passage of the Judicial Article will be made at the next legislative session in 1957.

MAINE

C. 77, requests the Judicial Council to study the desirability of creating a district court system integrating the activities of the present municipal court and trial justice system, removing domestic relations problems from the jurisdiction of the superior court, and setting up a state-wide uniform probation and parole system. The Council will report to the 1957 state legislature.

MARYLAND

H.D. 257, and *H.D. 642*, *bills* proposing a constitutional amendment to consolidate the common law, criminal and equity courts of Baltimore City into one court, *failed* to pass. However, the proposed constitutional amendment, intended to generally provide at least one judge in each county and create additional judgeships in four counties was *approved* by the voters in November.

MASSACHUSETTS

In his inaugural address in January, Governor Herter announced the appointment of a commission to conduct a survey of the judicial system of Massachusetts. The Commission, whose appointment was requested by the Massachusetts Bar Association, will consider the reorganization of the District Courts and the problems of congestion in the Superior Court, as part of the study of the entire administration of justice in all the courts of the Commonwealth.

MICHIGAN

H.B. 451, proposing a metropolitan court plan for Detroit, integrating and consolidating inferior courts in Wayne County, *failed* to pass.

H. J. Res. "I", proposing the organization of a system of probate court districts, *died*, as did *Sen. B. 1304*—to establish a uniform system of municipal courts and consolidate justice courts.

MINNESOTA

C. 881, now awaiting approval by the people, proposes a comprehensive revision of the state's Judicial Article. Under the proposed amendment, justice courts would be abolished and their criminal jurisdiction removed to District Courts; two additional Supreme Court judges would be authorized; District Judges could be assigned to act as judges of the Supreme Court; the term of all judges would be fixed at 6 years; and the legislature would be empowered to make provisions for retirement of judges.

PENNSYLVANIA

Passed by the legislature was *H. Res. 62* which directs the Joint State Government Commission to study the court system of Pennsylvania, problems of court administration, congestion of dockets, the giving of the rule-making power to the Supreme Court in criminal cases, reduction of costs of litigation and allied problems. The Commission is to report to the next regular legislative session.

TEXAS

H. J. Res. 13, proposing a constitutional amendment to provide for the automatic reapportionment of the State into judicial districts and to create a Redistricting Board to make such apportionment, *failed* to pass.

VERMONT

Sen. J. Res. 45, which *passed*, directs the governor to appoint a commission to make a complete review of the justice of the peace, municipal and probate court systems of the state, with a view to reorganizing the court structure. The Commission is to report to the governor and to the legislature by November 1956.

Sen. B. 112, which would have provided for full-time municipal court judges in four of Vermont's counties, and consolidation of the municipal court in two counties, *failed* to pass.

WISCONSIN

The legislature *passed*, for the first time, *Sen. J. Res. 25*, the proposed amendment designed to effect a thorough revision of Wisconsin's court system. The proposed amendment, vesting all judicial power in the Supreme Court, circuit courts, and justice courts, with branches of the circuit court taking over the work now done by the lower courts, must be approved by the 1957 legislature and then by the electorate before becoming effective. The Judicial Council, which recommended the amendment, will prepare a detailed court organization bill for the 1957 legislature.

United States Foreign Policy and Our Law Schools: an Objective View

By Louis B. Wehle

On a bench in the park a few weeks ago, I was sitting alone reading an early Latin edition of Grotius; and then I had the following experience which I shall recount from my *precis* made immediately afterwards.

A pleasant, eager-faced gentleman of middle age, unconventionally dressed, strolled over from where he had left a mechanical device. He sat down, after engagingly asking me whether he might, and said, "I have just this moment landed here from another planet; and I hope I am so fortunate as to find a man who can answer this question: I see that some of your islands and continents are thickly inhabited, which means that there must be a tendency to disorder and destruction, both among individuals and among peoples. Have you methods for preventing this?"

"I assume, sir, that you come from the planet we call Mars," said I. "I shall with pleasure try to answer your inquiry. In the first place, down here on the Earth, we have two chief instincts and two abiding and recurrent passions. First, there is the instinct of self-preservation." He nodded. "Then, you perhaps know, there is the sex instinct." "Yes, yes, quite," said he. "Then we

---

Editor's Note: The University of Michigan Law School has for several years conducted an annual Institute on International Law attended chiefly by law school teachers and by Department of State and United Nations officials. The Institute's 1955 over-all topic was *International Law and the United Nations*. This paper, delivered on June 23d at Ann Arbor, was part of a panel discussion on *Needed and Projected Research in International Law* under the chairmanship of Professor Philip C. Jessup of Columbia, the other panel members being Professors Herbert W. Briggs of Cornell, Quincy Wright of Chicago, and Stefan A. Riesenfeld of Stanford. Mr. Wehle, a member of the Association, has served in many important government positions. In 1944 and 1945, he was head of the United States Foreign Economic Administration's overseas Mission to the Netherlands. He has contributed a number of articles on international and comparative law to various publications and is the author of *Hidden Threads of History: Wilson Through Roosevelt*.

have the passion for beauty and the passion for justice. In addition, we have, and sometimes apply, religion as the spiritual influence for guiding, reconciling and controlling these four pervasive emotional forces amid our inner and external conflicts.

"So much for the background, Mr. Mars, if I may so address you. Now to answer your question, whether we have methods for preventing disorder and destruction: Some nations have achieved internal order through systematized rules called laws. An individual violating them, either will be punished by the State; or he may, on private complaint, be enjoined from, or have to atone for, such violation. Those nations we call civilized. In the majority of these, that is,—in what we call the Roman-Civil law nations,—the rules have, in the main, been arbitrarily imposed by men who have won control over the people by force. In other nations, especially the Anglo-American law ones, such as this, the rules have been chiefly developed by the people themselves or through their judges. In civilized nations generally, the laws have been so improved that a public penalty or a private remedy is provided for most types of injury done either to the State or to an individual."

"But, Mr. Earth, how do you prevent disorders between nations?" "We don't, Mr. Mars. For centuries they have been reduced by international contracts, called treaties. But many of the nations are still suffering from a war ended about ten years ago; and they are now drifting toward another which may wipe out some entirely. In fact, if you were to stay here for some time, you might have to make a sudden departure in your little space-ship." "But this is absurd!" protested my bench-mate. "Surely, if the nations have evolved laws to preserve order among individuals, they can control and reconcile their own collective instincts and passions by international laws."

"Now, Mr. Mars, I am ashamed to say that we haven't got very far on this. There are many reasons. I shall begin with a curious one which is rather indirect; but it is deep-seated and can give you some idea of the immobility of the obstructions to ordered world peace. Although most nations have up-to-date domestic

laws, the majority treasure in foreign relations a quaint set of rules imposed by a great imperialist nation on its subjects about 2,000 years ago. These rules dealt with such things as could happen in a world without our sciences of physics, chemistry, biology, bacteriology, and so forth,—without even gunpowder, steel or applied steam and electricity. This legal relic of the pre-scientific era is called Roman Law. The nations adopted a so-called 'collective security' agreement, or Charter of the United Nations, after their latest war. Through their majority, they chose judges, most of whom are disinclined to apply any law other than Roman Law to today's international controversies."

"But, Mr. Earth, how about your instinct for self-preservation and your passion for justice? Can your judges, or what I would call high priests, ignore them?" "Perhaps not, Mr. Mars, but the majority judges are from Roman-Civil law countries. Having been trained in international law which is so inflexibily Roman Law, they seem either unable or unwilling to free their minds from its limitations."

"Do you mean to say," he exclaimed, "that these priests are allowed to ignore a modern principle of justice which could settle an international dispute and perhaps avert another world war! Why didn't the nations require the priests, when necessary for justice, to use the modern law principles developed in the nations?" "Again you embarrass me, Mr. Mars. The nations did require that very thing in their charter that I've just mentioned, but the judges have rather disregarded the requirement."

"Now, really," he replied, with an uneasy smile that had a twist of suspicion, "I see you are jesting; so I will reciprocate by asking you why the priests are allowed by the nations to adjudicate any international dispute at all which might lead to war?" "They simply *aren't* allowed, Mr. Mars; and this is no jest, either. This is how it happened: The United Nations Council is the body charged with maintaining and enforcing peace. It has eleven members. Of these, the five most powerful nations (called 'the Big Five') are 'permanent' members, the other six memberships being temporary and held in rotation. The Charter says

that one permanent member alone can veto any proposal in the Council which is non-procedural,—that is, any which has to do with maintenance or enforcement of peace; but that action by the Council, merely procedural, like submitting a dispute to the Court, can be by any seven votes out of the eleven. This means, for instance, that, under the terms of the Charter, four smaller nations, with the help of three big ones, could submit a dispute to the Court against dissents of two big and two small nations.

"Before the Conference adopted the Charter, the Big Five made an outside agreement that any one of them, by its sole dissent, can prevent the Council's referring a dispute to the Court. Although the agreement was never approved by the Conference, it has been fully effective. The present chief of our foreign office was one of its foremost representatives at the Conference and presumably helped formulate the Big Five's agreement."

"Then, Mr. Earth, this means that the nations of your planet really want war." "No, Mr. Mars, I see your point, but it isn't so. A very powerful nation in the Big Five induced the other four to agree that one dissent could prevent submission to the Court, by promising that it would never so employ its dissent as willfully to obstruct the operation of the Council."

"Then I ask you: Has that powerful nation kept its promise?" "No, Mr. Mars, that nation, although one of the organizers of the United Nations, has been working for over thirty years avowedly and openly toward undermining from within, conquering from without, and permanently subjecting most of the other nations, including this one. With the aid of some other nations, allied with it through conquest or fear, it continuously strives in and outside of the United Nations Organization to foment international controversies and to prevent the peaceful settlement of any. It has consistently violated its promise by using its own dissent, or threat of one, in the Council to prevent submission of any controversy whatever by the Council to the Court. I hasten to confess before you ask me, that, *first,* none of the other nations, not even ours, has repudiated the agreement through which we were defrauded of the major service which the Court was to

perform for the Council; and *secondly,* the fraudulent, hostile, powerful nation is still a member."

"Then the title, '*United* Nations' is hardly—" "Mr. Mars, actualities do sometimes have a way of stultifying our words." His hand went abruptly to his forehead. "My mind reels," he said, "before such colossal confusion and suicidal make-believe in an international arrangement for peace." After a silence, he ventured weakly, "You doubtless have a class of distinguished scholars in your nation who teach the law of nations or who are foreign office officials. Do those scholars explain this gigantic frustration of Peace to the people and suggest means to end it? If not, are they not apt to be abolished when the people realize the slaughter that is impending?" "Mr. Mars, there seems to be no sign of such resentment. This may be partly due to the speech barrier. The vocabularly of that learnèd, disinterested class of persons is so incomprehensible to the average man as to isolate him from that class, and he probably could not understand the reasons for present conditions even if some specially frank member of it should try to explain them."

"Mistakes, neglected in a coincidence of silence, could become nationally destructive," he said, "but your apparently short memories here must be comforting to some of your public men. Then, ambitious scholars may be influenced by the power of the Court priests and other dignitaries in the United Nations Organization; while more patriotic, but static, scholars may be paralysed by the incredible political complex." "Be that as it may as to perhaps a small proportion of scholars, there is hope in our professional law schools," I declared. "Some of them are now becoming definitely dual schools, teaching, on the one hand, domestic law for the legal profession, and on the other, international law and relations to those headed for public service in foreign affairs, and to those relatively few who will practice the legal profession in the field of international law.

"Our law schools," I went on, "will, we hope, become an important agency for transforming international law into an adequate, vital system of justice, and also for constructively promot-

ing international cooperation on the levels both of politics and of the people's life. They should insist on the application of modern domestic law principles throughout our law of nations. They should, by analysis of that fraudulent agreement of ten years ago, indirectly bring about its nullification and a restoration of the International Court's true function. They should, by expansion and projection of existing legal norms into the future, lead the way toward collaboration among friendly nations in large-scale international enterprises. These should be organized regionally either as joint administrative Authorities or as corporations for engineering, construction, operation, and research; and the interests of the participating nations might thus become so merged that international disputes would seldom arise. A few schools are already alive to some of these ideas."

"If this change has begun," said my guest, "it seems that your law schools are becoming a force in the dynamics of international politics and business. Does not this new rôle of their's expose national policy to new forms of manipulation by designing domestic or foreign influences? If so, can the schools preserve the disinterestedness you mentioned? Would they not have to exercise vigilance to identify and prevent unfriendly action from outside, aimed at reaching the minds and motives of students and of teachers?"

"You have perhaps touched on a vital spot, Mr. Mars. Designing interests could try secretly to predispose or embarrass national policy through financial support of professorships and of special research or teaching projects, or by retainers of teachers as counsel. This danger, familiar to university departments of political science, could indeed appear in a new and even sharper form. It would be first, the responsibility of the law school teachers and administrators to handle; otherwise it might come publicly to concern our national law-makers. A school training for public service in the foreign affairs of a nation must be conditioned by its foreign policy. So long as the nations resort to war, and to commercial and other rivalries that can lead to war, no nation, Mr. Mars, could tolerate the presence of law schools

which embarrass, or impair the effectiveness of, its policies in international relations. This—"

"But," he interrupted, "even if the law schools throughout your nation should now come to perform the new rôle you have described, you must admit that, at best, they could serve only as an indirect cure for the conditions you have recounted. Could the cure operate in time?" "Mr. Mars, I don't know. Terrible mistakes have to be remedied. Conflicts contrived in many parts of the world by the fraudulent and destructive nation I spoke of, are rapidly becoming more acute. I have not mentioned how some established safeguards against aggression, deeply implanted in the law of nations by a century or two of international observance, have been impaired in recent years. Take the principle of domestic jurisdiction in connection with—"

"No, pardon me, I would rather not hear about it," said the Martian rising suddenly, yet courteously. "I long looked forward to visiting your planet, but I have already heard as much as I can bear about its instincts, passions, religion, and, above all, its international law. I prefer my own. If you can ever get away from here, come up and see me some time." And with that he quickly disappeared in his machine.

"To Return Or Not To Return, That Is the Question"

Congress adjourned its First Session of the 84th Congress without answering the question whether to return vested alien enemy property, but this matter will again be discussed at its coming Session.

On April 27, 1955, at a meeting under the sponsorship of the Committee on Foreign Law, Willis L. M. Reese, Chairman, the above question was debated. The debate was arranged and presided over by Otto C. Sommerich, Chairman of the Forum Subcommittee of the Committee on Foreign Law. The participants were Rudolf M. Littauer, a member of the Association, who spoke in favor of the return of the confiscated German property, and Cecil Sims, member of the Bar of Tennessee, who spoke in opposition.

On the 23rd of August, 1955, a similar debate took place at the Philadelphia meeting of the American Bar Association under the auspices of the International and Comparative Law Section of the American Bar Association. A referendum will be conducted shortly among the members of that Section, who will be asked to state their opinion on whether or not private property taken from German and Japanese nationals should be returned.

Therefore, the following respective addresses of the participants in the aforesaid debate held under the auspices of the Committee on Foreign Law on April 27, 1955, are timely.

THE RETURN OF ENEMY PROPERTY

By Rudolf M. Littauer

I

THE ANCIENT RULE

(a) The decisions of the Supreme Court regarding enemy property have been characterized from the outset by a conscious insulation from the rules of the law of nations.

The first case to come before the Court was *Brown* v. *U. S.*[1] This case arose during the War of 1812. A federal attorney, acting on his own initiative, filed a libel for the United States against some lumber lying in New Bedford, Massachusetts and owned by a British merchant. A purchaser from the owner questioned the legality of the seizure. He admitted that there was an ancient practice of the law of nations under which enemy property could be seized by the sovereign. He claimed that the modern usage of civilized nations was that private enemy property is not liable to confiscation and he claimed that when the Government of the United States was organized it could have received the law of nations only

"in its modern state of purity and refinement."[2]

(b) Chief Justice Marshall for the majority of the Court found that the seizure was illegal, in the absence of an act of Congress. He then proceeded to expound, by way of a dictum, what Congress could have done under the War Powers of the Constitution. He stated:

"that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found."[3]

He conceded that, as plaintiff had suggested, the

"humane and wise policy of modern times"[4]

had mitigated this rule, but he asserted that such mitigating policies could only

"more or less affect the exercise of this right."[5]

This meant a separation of the municipal from the international law. The Court had before it an ancient rule of law going back to primitive society, which outlaws the enemy national and his property. Under international law, according to most authorities then existing, this rule had become obsolete by modern usage which, in that field of the law, has normative power. Under municipal law the Court's dictum refused to recognize the normative power of usage, and preserved the rule in its original harshness. The position thus taken was to have fateful consequences for the future.

(c) The next step in the development of our doctrine presents another colorful historical picture.

Congress in 1862, at the height of the Civil War, adopted the so-called Second Confiscation Act[6]

Section 5 of the Act established six classes of persons who had committed what was tantamount to overt acts of treason, and it provided that if they

"to insure the speedy termination of the present Rebellion."[7]

continued in their course of conduct, their property would be seized and used for the support of the army of the United States.[8]

These provisions were apparently penal in nature. The President, upon receiving the bill, indicated to members of Congress that he thought it was

unconstitutional because it provided that traitors would forfeit their entire property, while the Constitutional provisions regarding the punishment of high treason permitted only forfeiture of a life estate. Congress, in order to obviate a Presidential veto, adopted a joint resolution which provided that an "offender" would suffer "forfeiture" only to the extent of a life estate in real property.[9] The use of these two terms reaffirmed the impression that the statute had a penal character.

When the matter was brought before the Supreme Court in *Miller* v. *U. S.*,[10] it was argued that the statute had failed to respect further constitutional safeguards, such as those requiring indictments by a grand jury, jury trials, etc. The Supreme Court, in a decision which the historian might call political, made use of Chief Justice Marshall's dictum of seventy years before. It held that the rebel leaders were not only citizens but also enemies and that Congress had not made a criminal law but had exercised the ancient right of the sovereign to outlaw the enemy and his property.

Miller v. *U. S.* could still be restricted to its facts. It could be argued with good reason that the Supreme Court, forced by the necessities of a civil war, had used the right of outlawry to avoid constitutional limitations upon the powers of Congress in the field of criminal procedure, but had not yet permitted a general seizure of the property of private citizens of an external enemy.

(d) Again the pressure of historical realities proceeded to shape legal doctrine. At the outbreak of the First World War Congress had adopted the Trading with the Enemy Act,[11] which, in its Section 7(c), permitted the seizure of enemy property. An Alien Property Custodian was to hold such property as a common law trustee until Congress would ultimately dispose of it. After a short while the Custodian asked for power to sell property in his hands, and, to exemplify the need for such power, reported that he was holding materials, which would be useful in support of the war effort.[12] Congress complied.[13] Subsequently, the Custodian embarked on a large-scale transaction: He had taken almost 5,000 German patents covering key developments of the organic chemical industry; he sold these patents at about $50 apiece to a newly organized corporation, the Chemical Foundation, Inc. That corporation in turn proceeded to grant licenses at nominal fees to American industry.[14]

In 1922 the government brought action to set aside this sale.[15] The then Attorney General, Harlan F. Stone, attacked the transaction as "a dangerous precedent in American life" and as "subversive of the future of the country."[16] The Court did not agree with him. Applying the sweeping rule established in *Miller* v. *U. S.*, it maintained the power of Congress to take all enemy property without restriction.

"Candor and common sense"[17] compel us to recognize the powerful forces which appear to have caused this decision: The strong public interest in Americanizing a vital defense industry and the fear of severe losses to private interests which would have resulted from a belated rescission. Thus, another

special situation caused the Court to reaffirm the rule of outlawry of enemy private property.

(e) The practice followed by this country was in no way as radical as the rule would have permitted. After the termination of the War, Congress decided to return enemy property;[18] 80% of the total was in fact returned while the balance of 20% was held with the consent of Germany to make available funds for the immediate payment of certain American and German claims. The German Government in turn was to make certain long-term payments which were to be used for the eventual return of the 20%; and such 20% would have been returned if Germany had not defaulted in the early days of the Hitler regime.[19]

The Courts, however, continued to fortify the doctrine. After the war, several cases came up to the Supreme Court dealing with specific questions, such as the right of the Custodian to charge administrative fees,[20] or the right to withhold the 20% after Germany had defaulted.[21] In each case, the Court, instead of finding specific justifications to uphold the Custodian which would have been available, relied on the plenary powers of Congress to confiscate.

(f) In our days, the ancient and harsh character of the rule and its divergence from modern usages, seem to have faded from conscience. The doctrine now stands on its own, based on World War I decisions which no longer reflect its shaky origins. Yet we can discern a certain uneasiness on the part of the Court. Several recent rulings have restricted the application of the rule in marginal situations. We need refer only to such cases as *McGrath* v. *Zander*,[22] *Guessefeldt* v. *McGrath*,[23] or *Kaufman* v. *Societe Internationale*.[24] Conceivably, this uneasiness will grow and some day it might become sufficient to cause the Court to reverse itself.

It can still be said that the path for such reversal is not closed: *Miller* v. *U. S.* is distinguishable on its facts; the Chemical Foundation case could be explained by the existence of special political and economic forces, while other World War I decisions can be upheld on grounds other than a power of Congress to confiscate enemy private property. However, to expect such reversal would be rather sanguine, to say the least.

Hence, the question before us today appears to be one of policy only: Is it wise for Congress to confiscate enemy property? We will propose that it is not, that such confiscation is in conflict with certain fundamental policies, and that the benefits gained by confiscation are outweighed by the harm which results.

II

CONFISCATORY POLICIES

(a) At the outbreak of the late war, Congress granted a new sweeping set of administrative powers over alien property. The First War Powers Act of December 18, 1941[25] amended Section 5(b) of the Trading with the Enemy Act and authorized the President—not only in case of war, but also during a

national emergency—to vest the property not only of the enemy but also of any other foreign country, and of their nationals.

These vesting powers were exercised in pursuance of three distinct policies:

(i) The use of alien property during the war in support of the war effort.
(ii) The permanent elimination of the war potential of the enemy after his defeat.
(iii) The satisfaction of reparation claims against the enemy government.

A survey of developments since 1941 shows that at least two of these three policies have by now become obsolete, while the third can no longer be considered as acceptable beyond doubt.

(b) The first policy prevailed while the war lasted. Originally, the vesting powers had been delegated to the Custodian only insofar as appeared appropriate for the purposes of conducting economic warfare and of supporting the war effort. Generally speaking, the Custodian was permitted to vest property of a productive nature.[26] Such property could be vested, whether it was owned by enemies, or by alien friends. Other non-productive property, such as bank accounts or securities, was not vested, even if owned by enemy nationals, but was left to the Federal Freezing Regulations[27] which merely prevented the enemy from exercising control over it.

This first wartime policy found its end once hostilities were terminated; it did not require or justify the continued retention of any vested property. The Custodian was in accord with this conclusion; he so stated in his 1945 report.[28]

(c) When the end of the war was foreseeable, however, the Administration took steps to lay the basis for the two other policies. Early in 1945, the Custodian obtained from the President plenary powers to vest all property of the enemy,[29] whether productive or unproductive. This measure in turn was supplemented by legislative acts. Congress extended an administrative procedure[30] permitting the return of the property of those who appeared to be mere technical enemies, such as the occupants of liberated territories. In that manner the road was cleared to isolate the property of enemy nationals and to subject it to a harsher postwar rule.

(d) The new policies were worked out in the course of the International Conferences of 1945 and 1946.

The Yalta conference[31] placed emphasis on the first one, which was to have Germany pay reparations for the damage caused by it. There was agreement that only reparations in kind should be collected. The Russians asked for the dismantling of German industries and for their shipment to Russia, while the West called for the taking of external assets, that is to say, of the holdings of Germany and of its nationals outside of its boundaries.

The Potsdam Conference[32] formulated the second policy, by deciding that dismantling should simultaneously pursue the purpose of eliminating Ger-

many's war potential. The Paris conference of January, 1946[33] (which was attended by the Western allies only) further applied the second policy to the external assets. To that end, the Western allies agreed among themselves to exclude any future return of such assets into German hands.[34] Similarly, claims presented by the Allies to neutral countries such as Switzerland, for the surrender of German property, located in their territories, were justified by the need for eliminating Germany's power to wage another war.[35]

(e) The wheels of fortune turn, and between 1946 and 1954 they turned with considerable speed.

First to fall was the dismantling program. In 1948, the dangerous economic weakness of Western Europe led to the adoption of the Marshall Plan,[36] which was irreconcilable with a further lowering of the industrial level of Germany. In 1949, the Federal Republic of Germany was organized, and its government, after having given solemn assurances of its democratic policies and its intention to remain disarmed, obtained the termination of dismantling in the Federal Republic.[37] Thus, at least one of the two sources for the delivery of reparations in kind was closed.

Subsequent events destroyed the basis of the entire second policy: to eliminate Germany's war potential. Germany was to be rearmed and incorporated into the Western Defense System. The Bonn Agreement of 1952[38] was to make it a member of the European Defense Community. Its 1954 substitute[39] provides for Germany's membership in NATO.

As a result of the abandonment of disarmament, we should now conclude that the 1946 agreements among the Western allies regarding the prevention of a return of external assets to Germany, which were based on the second policy, have become obsolete and have therefore lost their binding force. This is in fact the position which was taken by Secretary of State Dulles in his testimony before a Senate Committee in the Summer of 1954.[40]

(f) Thus, all that remains with us now of the original policies is the reparations policy, and even that policy only to the extent to which it relates to German external assets; and whether the maintenance of this residue is still justified is subject to at least some doubts. They stem from the treatment which this country has accorded to vested assets of Italian nationals. Such assets were returned under the so-called Lombardo agreement of 1947[41] upon payment by Italy of a token sum of $5,000,000 on account of reparations and on the theory that Italy, in the last days of the war, had become a co-belligerent of the allies. In the case of Germany, this precedent was not followed. Both the EDC agreement and the NATO agreement expressly provide for what has been called a renunciation by Germany on behalf of its nationals, of all claims for the return of vested property.[42] The Bonn Parliament recently protested and adopted a unanimous resolution which claimed that the provisions just mentioned were "oppressive and discriminatory" and "completely inconsistent with Germany's new role among the free nations."[43] Having protested it felt compelled to ratify the treaty as a whole, with the express reservation "that the Federal Republic is permitted to start negotiations (for the return of the assets) without limitations on a free and bilateral basis with countries prepared to negotiate."[44]

(g) There remains to report that Congress, at least for some time, imposed a serious emotional and economic burden upon our question by adopting the War Claims Act of 1948.[45] That Act determines what use is to be made of the proceeds from the sale of German and Japanese assets by the Custodian. Various kinds of reparation claims could have been selected. Congress chose five, of which the following three are the more important ones: Those of civilians who were interned by the Japanese or remained in hiding from them; those of certain religious institutions in the Philippines which suffered damages from the Japanese and incurred expenses during the war; and those of American prisoners of war of both the Japanese and the German armies, on the assumption that both countries treated their prisoners in contravention of the Geneva Convention. Nobody would want to even question the propriety of these claims. Accordingly, for some time any proposals for the return of vested property required simultaneous proposals for finding new funds to satisfy the American beneficiaries. By now, steps are being taken to make such new funds available[46] and if, as is likely, they will be sufficient for the purpose, the problems raised by the War Claims Act no longer stand in the way of a return.

III

THE PROTECTION OF PRIVATE PROPERTY

(a) The wisdom of a confiscation of the property of enemy nationals for the purposes just described can be discussed from two viewpoints: From the viewpoint of specific practical problems of our day, or from the viewpoint of its over-all effect upon the principle of the inviolability of private property.

The practical approach was taken by Secretary of State Dulles in his testimony before a Senate Committee in 1954, when he said:

> "I would think that in an era when we expect the American interests abroad, American capital investments abroad, it is wise for us to adhere ourselves strenuously to the highest standards of conduct in relation to those matters. That puts us in a better position to call upon others to apply the same standards."[47]

or, in yet simpler words,

> " . . . The United States, consistently with its policy of recognizing the sanctity in time of war, did make restitution . . . . I believe . . . that it was good business from the standpoint of the United States to do it."[48]

These statements are related to the fact that our confiscatory policies are in conflict with a concern of the first order of those to whom the conduct of the foreign affairs of this country is entrusted: The need for inducing American private interests to invest abroad by offering them protection. Efforts of

American representatives to support this policy are handicapped while the practice of confiscation of enemy property prevails.

(b) This country is now the leading creditor nation. As such, it has to take measures to balance international payments and to bridge what is commonly called the "dollar gap." This is required from the standpoint of the economic welfare of both the United States and the whole free world.[49] In earlier postwar days, public aid, such as the Marshall Plan, was used for that purpose; since then, consistent efforts have been made to replace public aid by private measures.[50] Two such measures are especially effective: The importation of foreign goods and the export of American capital.

A second equally important aspect of the same policy is directed at those areas of the world which are poverty ridden and present a temptation to Communist expansion. Ever since President Truman's "Bold New Program"[51] it has been established that aid to underdeveloped areas, in order to be effective, must supply not only technological know-how but also American private capital for the development of new industries.

(c) Both the Democratic and Republican postwar administrations have strongly affirmed these policies whenever an occasion offered itself.[52] Likewise, Congress on various occasions since 1949 has adopted legislation to promise protection abroad to private capital.[53] Such legislation authorized the making of agreements with foreign countries in order to establish a favorable climate for American investors and it provided for American government guaranties backing up the obligations assumed by foreign countries in such agreements.

However, the program was not successful[54]; and its failure can be traced in large measure to its irreconcilability with the policies regarding enemy property. One of the decisive factors, if not *the* decisive factor, which repels the potential investor abroad is the risk of war losses, and it is that risk which this country, because of its domestic attitude, cannot cover satisfactorily.

What might have been accomplished had we continued to pursue practices to which this country adhered in the 19th Century, is exemplified by the terms of a treaty of friendship with Bolivia made in 1858, which read as follows:

> "If, by any fatality (which cannot be expected, and which God forbid), the two contracting parties should be engaged in a war with each other, now for then, . . . neither the debts due from the individuals of one nation to the individuals of the other, nor shares, nor monies . . . shall ever in any event of war or of national difference be sequestered or confiscated."[55]

How much less could be done in our days, in view of domestic policies, is shown by the terms of investment agreements made under the ECA statute. The agreement with Denmark, for example, in referring to the settlement of claims for damages arising as a consequence of governmental measures, expressly excludes "measures concerning enemy property or interests"[56] and

nothing in the agreement is designed to bring about its survival in case of the outbreak of a war.

(d) In turning, finally, from specific questions to the fundamental one, logic compels us to proceed from a recognition that any seizure of the property of private individuals for the satisfaction of claims against their country, is an exception from the principle of the inviolability of private property.

This exception may appear proper to an observer who is familiar with the development of the American legal doctrine. He may feel that the mere recognition by the Courts of the sovereign's ancient right endows the exception with legitimacy. Outside of the domain of the common law, however, the existence of a municipal doctrine, alone, will not be convincing, and its accidental historical development will be apparent. Thus, even though the exception is sanctioned by the domestic law, it may still seem to the foreign observer to be inconsistent with the principle of the inviolability of private property.

Such impression is harmful to a great cause. This country has taken its stand as the champion of the rights of the individual; its Constitution serves as an example for firm safeguards against undue restrictions of the individual and of his property. It rejects the philosophy of collectivism which tends toward merging the individual and his property with his community.

We may well pause to consider whether a policy of collecting on reparations claims against the enemy government by seizing private property of its nationals, is not an adoption of collectivist policies.

In the past, the same question of principle has come up twice, and each time the principle was maintained. After the Revolutionary War (which had engendered great bitterness against exiled Tories and British nationals), Alexander Hamilton, supporting the Jay Treaty which called for compensation, stated:

> "No power of language at my command can express the abhorrence I feel at the idea of violating the property of individuals which in an authorized intercourse in time of peace has been confided to the faith of our government and laws, on account of controversy between nation and nation. In my view, every moral and every political sense unite to consign it to execration."[87]

After World War I, an imposing array of statesmen again decided in favor of the principle.[88] We may quote the words of Mr. Bernard Baruch:

> "Back in the days of the Versailles Treaty when Britain and France urged that the private property sequestered of aliens should be seized I took a definite decision and said: 'No.' I took the stand in Paris that under all law, all morality, and all tradition, all private property of former enemies . . . was inviolate. I would not permit it."[89]

(e) This was said in the 1920s. It may be that in our days the principle should not again be maintained and that this time (after World War II) the exception is justified. However, before saying so, we should face the true

grounds for any such exception: They would be an assertion of the collective guilt of enemy nationals. If, because of the singular history of the 1930s, the nationals of Germany and Japan can be identified with their governments, they can indeed be said to be liable for the damage which was caused with their approval. If such identification cannot be made, private property should be returned. On this point everyone will have to make his own decision.

One concluding suggestion may be permitted, however: International law was created in the 17th Century as an outgrowth of one of the most horrid wars of modern times: the Thirty Years War between the Protestant and Catholic Princes of Central Europe. In that war, the ancient rule of outlawry had been applied without restraint and barbarism had reigned throughout. When the war was over, Central Europe was depopulated and standards of civilization painfully acquired in earlier times had disintegrated.

International law then was a conscious effort of the philosophers of the day to stem the decline of civilization and to establish progressive rules. To some extent, we find ourselves again in the same situation. Again, a confirmation of the modern usage regarding enemy property would be progressive self-restraint; and, since the matter of self-restraint is at stake, we should not waiver in our decision because of the crimes committed by others.

FOOTNOTES

[1] 8 Cranch 110 (U. S. 1814).
[2] *Id.* at 112.
[3] *Id.* at 122.
[4] *Id.* at 123.
[5] *Id.* at 123.
[6] 12 STAT. 589 (1882).
[7] Miller v. United States, 11 Wall 268, 308 (U. S. 1871).
[8] *Id.* at 308, 318–19.
[9] *Id.* at 320.
[10] *Id.*
[11] 40 STAT. 411 (1917), 50 U.S.C.A. App. §1 *et seq.*
[12] United States v. Chemical Foundation, 5 F. 2d 191, 200 (3rd Cir. 1925), *modified*, 272 U. S. 1 (1926).
[13] 40 STAT. 460 (1918), 50 U.S.C.A. App. §12.
[14] United States v. Chemical Foundation, 5 F. 2d 191, (3rd Cir. 1925), *modified*, 272 U. S. 1 (1926).
[15] *Id.*
[16] Borchard, *Nationalization of Enemy Patents*, 37 Am. J. Int. Law 92, 93 (1943).
[17] Moore, *Candor and Common Sense* (1930).
[18] Settlement of War Claims Act of 1928, 45 STAT. 254 (1928); Guessefeldt v. McGrath, 342 U. S. 308, 314, footnote 6 (1952).
[19] Public Resolution No. 53 of June 27, 1934, 48 STAT. 1267 (1934); Guessefeldt v. McGrath, 342 U. S. 308, 314, footnote 6 (1952).
[20] Woodson v. Deutsche Gold, 292 U. S. 449 (1934).
[21] Cummings v. Deutsche Bank, 300 U. S. 115 (1937).
[22] 177 F. 2d 649 (D.C. Cir. 1949).

[22] 342 U. S. 308 (1952).

[24] 343 U. S. 156 (1952).

[25] 55 STAT. 839 (1941).

[26] EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942), as amended by EXEC. ORDER No. 9193, 7 FED. REG. 5205 (1942).

[27] EXEC. ORDER No. 8389, 5 FED. REG. 1400 (1940), as amended; note following 12 U.S.C.A. App. §95a.

[28] ANNUAL REPORT OF ALIEN PROPERTY CUSTODIAN, 2 (1945).

[29] EXEC. ORDER No. 9567, 10 FED. REG. 6917 (1945), amending EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942).

[30] 50 U.S.C.A. App. §32.

[31] New York Times, March 17, 1955, pp. 47 *et seq.*

[32] S. Doc. 123, 81st Cong., 1st Sess., pp. 34–48.

[33] Department of State Publication No. 2584, European Series 12, pp. 11–21.

[34] *Id.* at Art. 6A, pt. I.

[35] Washington Accord of March 25, 1946, 14 DEPARTMENT OF STATE BULLETIN, 1121 (1946).

[36] The Economic Cooperation Act of 1948, 62 STAT. 137 (1948), 22 U.S.C.A. §1501 *et seq.* (1952).

[37] Department of State Press Release No. 919, November 24, 1949.

[38] S. Docs. Executive Q and R, 82d Cong., 2d Sess.

[39] Department of State Publication No. 5659, London and Paris Agreements.

[40] *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 3423*, 83d Cong. 2d Sess., p. 161. In fact, Secretary Dulles said that the promises which the Western allies had made to each other early in 1946 were "without authority whatever" to bind Congress. *Id.*

[41] Department of State Publication No. 3221, Memorandum of Understanding between the United States and Italy.

[42] S. Docs. Executive Q and R, 82d Cong., 2nd Sess., Ch. 6, Art. 3, pp. 59–60; Department of State Publication No. 5659, London and Paris Agreements, p. 92. The so-called renunciation of claims by the German government "on behalf of its nationals" and the promise of that government to compensate its citizens "for all property vested and retained by the allies" as contained in the London and Paris agreements are said to justify the retention of vested assets by this country. This is a specious argument. If it is correct that private property rights must not be taken without just compensation then the duty to pay such compensation cannot be discharged by obtaining a promise of the German government to make payment. Germany is in no position to pay full compensation for vested property. War damages have been suffered by German nationals not only as a result of the confiscation of external assets but also as a result of war action, and of the expulsion of German citizens from various East German territories, annexed by Russia and Poland. Any attempt of the German government to compensate former owners of American assets according to American standards of just compensation, while all other Germans who suffered war damages cannot be paid on the same scale is a political impossibility. Moreover, it has been asserted persuasively that any renunciation of claims to vested property if in fact intended by the German government, would violate the German Constitution. See H. Abs in I, Recht der Internationalen Wirtschaft, 1955, pages 145–146.

[43] Bundestag Protocol, February 27, 1955, pp. 3935, 3937–39.

[44] New York Times, February 27, 1955, p. 1.

[45] 62 STAT. 1240 (1948), 50 U.S.C.A. App. §2001 *et seq.*

[46] See 67 STAT. 461 (1953), 50 U.S.C.A. App. §39(b) (Supp. 1954); 68 STAT. 759, 761

(1954), 50 U.S.C.A. App. §§2004(g), 2005(e) (Supp. 1954). See also Department of State Press Release No. 122 of March 3, 1955, which expresses the intention of the Department of State to allocate $100,000,000 from payments to be made by the Federal Republic "on its debt to the United States on account of postwar economic assistance."

[47] *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 3423*, 83d Cong., 2d Sess., p. 162.

[48] *Id.*

[49] President Eisenhower's Foreign Economic Policy Message on March 30, 1954, 1954 U. S. Code Cong. and Adm. News, pp. 1648–49.

[50] Economic Cooperation Act of 1948, 62 STAT. 137 (1948), 22 U.S.C.A. §§1501, 1509(b), 1513(b) (10) (1952); Act for International Development, 64 STAT. 204 (1950), 22 U.S.C.A. §§1557, 1557a, 1557e (1952); Mutual Security Act of 1951, 65 STAT. 373 (1951), 22 U.S.C.A. §§1651, 1667 (1952); Mutual Security Act of 1954, 68 STAT. 862 (1954), 22 U.S.C.A. §§1751, 1933 (Supp. 1954).

[51] President Truman's Inaugural Address on January 20, 1949, 1949 U. S. Code, Cong. Serv., p. 2481.

[52] Id., at pp. 2481–82; President Truman's Point Four Message on June 24, 1949, 1949 U. S. Code Cong. Serv., p. 2520; President Truman's State of the Union Message on January 7, 1953, 1953 U. S. Code Cong. and Adm. News, pp. 724–25; President Eisenhower's State of the Union Message on February 2, 1953, 1953 U. S. Code Cong. and Adm. News, pp. 776–7; President Eisenhower's Reciprocal Trade Agreements Message on April 7, 1953, 1953 U. S. Code and Adm. News, pp. 794–5; President Eisenhower's Foreign Economic Policy Message on March 30, 1954, 1954 U. S. Code and Adm. News, pp. 1648–49, 1651; President Eisenhower's State of the Union Message on January 6, 1955, 1955 (Supp.) U. S. Code Cong. and Adm. News, pp. 4–5; President Eisenhower's Foreign Economic Policy Message on January 10, 1955, 1955 (Supp.) U. S. Code Cong. and Adm. News, pp. 15, 17; Report to the President on Foreign Economic Policies by Gordon Gray, pp. 12–13, 61–63 (1950); Report to the President and the Congress, by the Commission on Foreign Economic Policy, pp. 16–27 (1954).

[53] *Supra*, note 50.

[54] Report to the President and the Congress by the Commission on Foreign Economic Policy, pp. 16–18 (1954).

[55] Treaty of Friendship, Commerce and Navigation with Bolivia 1858, Arts. 28, 29, 1 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS, 112, 122–23 (1910). Numerous other treaties contained provisions against sequestration or confiscation in the event of war. Brazil, 1828, Arts. 24, 25, 1 *Id.* at 133, 141; Central America, 1825, Arts. 25, 26, 1 *Id.* at 160, 167–8; Chile, 1832, Arts. 23, 24 1 *Id.* at 171, 178; Colombia, 1846, Arts. 27, 28, 1 *Id.* at 302, 310; Costa Rica, 1851, Art. 11, 1 *Id.* at 341, 345; Dominican Republic, 1867, Art. 1, 1 *Id.* at 403–4; Ecuador, 1839, Arts. 26, 27 1 *Id.* at 421, 428–9; Great Britain, 1794, Arts. 10, 26, 1 *Id.* at 590, 597, 605; Guatamala, 1849, Arts. 25, 26, 1 *Id.* at 868; Honduras, 1864, Art. 11, 1 *Id.* at 952, 956; Mexico, 1831, Art. 26, 1 *Id.* at 1085, 1093; Nicaragua, 1867, Art. 11, 2 *Id.* at 1279, 1283–84; Peru, 1887, Arts. 27, 28, 2 *Id.* at 1431, 1439; Salvador, 1870, Art. 27, 2 *Id.* at 1551, 1559; Venezuela, 1836, Arts. 26, 27, 2 *Id.* at 1831, 1839.

[56] 62 STAT. 2199, 2214–15 (1948).

[57] 4 HAMILTON'S WORKS 60 (Lodge ed. 1885).

[58] Letters to Senator Capper from Secretary of State Hull, May 27, 1935, quoted in 37 Am. J. Inter. Law 94 (1943); Secretary of State Hughes in an address at Philadelphia on November 23, 1923, quoted in 18 Am. J. Inter. Law 531 (1924).

[59] Statement quoted in Daily Cong. Record, April 13, 1955, p. 3671.

IN OPPOSITION TO THE RETURN OF ENEMY PROPERTY

By Cecil Sims

I

There is no rule of international law which requires the return of external enemy properties seized and vested by the United States during World War II, or which prohibits international agreements stipulating that such properties may be retained in lieu of reparation claims against a defeated enemy.

In the absence of an international legislature, the true sources of international law are:

(1) The practice of nations.
(2) Treaties between nations.
(3) Declarations of sovereigns.
(4) Court decisions.
(5) The opinion of authoritative writers.

"Authoritative writers" in the field of international law are generally those eminent authors whose statements coincide with one's own immediate interest, prejudice, or opinion. Stated conversely, and in the words of Lord Salisbury, taken from a letter which he wrote to The Times on July 26, 1887:

> "International law . . . depends generally on the prejudices of the writers of text books."[1]

Looking to the practice of nations and beginning with early Hebrew history we find that conquered people were either killed or made slaves and all property was confiscated. These are the words which Moses "spake unto all Israel on this side of Jordan in the wilderness, in the plain over against the Red Sea":

> "And the Lord our God delivered him before us; and we smote him, and his sons, and all his people.
>
> "And we took all his cities at that time, and utterly destroyed the men, and the women, and the little ones, of every city, we left none to remain.
>
> "Only the cattle were took for a prey unto ourselves, and the spoil of the cities which we took."[2]

In the Greek and Roman wars complete confiscation of private property belonging to alien enemies was common procedure and was so widely recognized that it found its way into the Justinian Code, which stated that persons going to another country in times of peace might have their goods confiscated

---

[1] Wheaton, International Law, vol. 1, page 6.
[2] Deuteronomy 2: 33–35.

if war should break out, unless treaties made between the nations provided otherwise.

In early English history, under *Magna Charta,* visiting merchants were given protection on their goods, except in time of war, when:

> "They shall be attached without harm of body or goods, until it be known unto us, or our Chief Justices, how our merchants be entreated (therein) the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us."

Beginning with the fifteenth century many treaties were made between Great Britain and other European countries which afforded some protection of enemy property in time of war, but these treaties generally referred only to the property of merchants, and provided for a period of time for safe withdrawal of merchants and their property.

Declarations of war, where such treaties were in existence, generally stipulated and provided for the time for such safe withdrawal.

But the Revolutionary War between the Colonies and Great Britain witnessed an important change in the practice dealing with the external assets of an enemy. On November 27, 1777, the Continental Congress recommended to the State Legislatures that the property of English subjects be confiscated. This resolution was as follows:

> "Resolved, that it be earnestly recommended to the several states, as soon as may be, to confiscate and make sale of all the real and personal estate therein, of such of their inhabitants and other persons who have forfeited the same, and the right to the protection of their states, and to invest the money arising from the sales in continental loan certificates, to be appropriated in such manner as the respective states shall hereafter direct."

Practically all of the states followed this recommendation, and five years later, on September 10, 1782, the Continental Congress recommended to the states that the properties seized by them be held as restitution for the losses suffered by their own citizens during the war, this resolution being:

> "Resolved, that in the meantime the Secretary of Foreign Affairs inform the said ministers, that many thousands of slaves, and other property to a very great amount, have been carried off or destroyed by the enemy; that in the opinion of Congress, the great loss of property which the citizens of the United States have sustained by the enemy will be considered by the several states as an insuperable bar to their making restitution or indemnification to the former owners of the property, which has been or may be forfeited to or confiscated by any of the states."

The Treaty of Peace which was signed in 1783 provided for the return by the states of some of the confiscated property, and the Continental Congress recommended to the states that their legislative enactments be brought into harmony with the terms of the treaty. Four of the states (South Carolina,

Delaware, Connecticut, and New York) followed the recommendation, but the remaining states declined to do so.

Great Britain protested the failure of the states to follow the treaty provisions, and the states in turn protested to Congress that England had not observed the terms of the treaty, and this controversy was resolved in the Jay Treaty of 1794. Under the terms of this treaty the National Government accepted responsibility for violations of the treaty by the states, and the National Government agreed to be responsible for the return of the confiscated property that the states had failed to return *to the extent it was covered by terms of the treaty of peace,* and $3,000,000 was appropriated by the National Congress to take care of the claims.

It is important to note that the question of returning, or not returning, confiscated enemy properties was determined by the terms of the treaty, that the treaty provided for the return of only a portion of the property, and that the unqualified right of the several states to seize and confiscate their enemy's property was never questioned, and was expressly upheld by the Supreme Court of the United States in *Ware* v. *Hylton,*[3] in which decision Chief Justice Chase said:

> "It appears to me that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever) wherever found, whether within its territory or not."

Thus, as early as the American Revolutionary War, the practice of retaining vested enemy properties as restitution for reparations was resorted to by the states on the recommendation of the Continental Congress. While a portion of the properties was later returned, a substantial amount was retained to satisfy claims against the defeated enemy.

II

In the early part of the Civil War confiscation of private property of residents of the southern states, who were known as "rebels," was invoked by the Congress of the United States in two separate acts, one in 1861 and the other in 1862, and the validity of this legislation was expressly approved by the Supreme Court of the United States.[4]

That case involved certain shares of stock in two Michigan corporations which were seized as the property of Samuel Miller, of Amherst County, Virginia, the proceeds being used to help defray the expense of the Union Army. The purpose of the Act of 1862 was stated to be:

> "An act to suppress insurrection, punish treason and rebellion, seize and confiscate the property of rebels, and for other purposes."

---

[3] Ware v. Hylton, 3 Dallas, 199.

[4] Miller v. U. S., 11 Wallace 268.

In that decision, the Supreme Court rejected the argument that the Civil War was a rebellion and therefore not subject to the rules of international law, holding that the law of nations applied to the Civil War and that under international law seizure and confiscation of enemy properties was authorized. Nor did the subsequent proclamations of amnesty have the effect of restoring the confiscated properties of Southerners where the properties had been disposed of and the funds used to support the Union Army.

In *Wallach* v. *Van Riswick*,[5] (involving seized real estate in Washington, D. C., belonging to an officer in the Confederate Army), the Supreme Court said:

> "It has been argued that the proclamation of amnesty after the close of the war restored to Charles S. Wallach his rights of property. The argument requires but a word in answer. Conceding that amnesty did restore what the United States held when the proclamation was issued it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy."

Aside from its agricultural lands, the chief economic wealth of the South at the beginning of the Civil War consisted in the slaves owned by Southerners, which had been expressly declared to be property in the famous *Dred Scott* decision. All of these slaves, representing millions of dollars in actual investments, were confiscated by the emancipation proclamation of President Lincoln effective January 1, 1863, which provided:

> "I do order and declare that all persons held as slaves within said designated states and parts of states are, and henceforward shall be, free; and that the Executive Government of the United States, including the Military and Naval Authorities thereof, will recognize and maintain the freedom of said persons."

Although President Lincoln conceded that slaves were property and that emancipation was confiscation, and asked Congress to provide compensation in payment of this deprivation of property rights, Congress refused to enact the required legislation. In order to make certain that compensation would never be paid for this confiscated property, there was written into Section 4 of the Fourteenth Amendment to the Constitution, the following provision:

> "But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."

It should be remembered that compensation for emancipated slaves was denied to the South after the Civil War notwithstanding the earlier official

---

[5] Wallach v. Van Riswick, 92 U. S. 202.

declaration made by John Quincy Adams, Secretary of State, during the War of 1812, when the British sought to entice southern slaves to seek asylum on British vessels with a promise of emancipation. Writing to Henry Middleton, United States Minister at St. Petersburg, Russia, on July 5, 1820, the Secretary of State said:

> "Admiral Cochran had no lawful authority to give freedom to slaves belonging to citizens of the United States. The recognition of them by Great Britain, in the treaty, as property, is a complete disclaimer of the right to destroy that property by making them free."

Randall, in his authoritative work *"Constitutional Problems Under Lincoln,"*[6] states:

> " . . . . it is correct to think of Adams' statement as expressing the official American doctrine on the subject up to the time of the Civil War."

It would seem that those who contend that international law and the honor and integrity of the United States among the family of nations requires the return of enemy property to a defeated European nation must of necessity concede that under the same rules of international law Congress should be asked to first appropriate such funds as may be required to compensate the South for the confiscation of its slave property. While the emancipation of the slaves involved a moral issue, it also constituted confiscation of established legal property rights.

III

In less than thirty days after the outbreak of the First World War Germany seized all enemy property within its jurisdiction. Notwithstanding this fact, the heads of some of the German houses in Germany who owned property in France petitioned the Civil Tribunal of the Seine asking for the judicial appointment of Administrators to protect their goods and interests in France during the War. This petition was immediately rejected and by special decrees and special laws all German property was seized and sequestered for the "good of the public order."

Great Britain likewise seized all enemy property placing it in the custody of a public official with instructions to hold the property until after the War unless directed to do otherwise by the Board of Trade or The High Court.

During the progress of the War the Allied powers held an economic conference in Paris in June 1916 and gave careful consideration to the treatment of sequestered enemy property, with the result that France and Great Britain determined to liquidate certain types of private enemy property as a reprisal

[6] Page 347.

for the acts of Germany and all of the allied powers immediately began the liquidation of such private property as a result of this agreement. Germany then began the liquidation of the enemy private property which it had seized.

This was the situation when the United States entered the War in 1917. At that time a treaty was in existence between the United States and Prussia (ratified in 1799 and re-enacted in 1828), Article XXIII of which allowed merchants of either country, then residing in the other to remain nine months in such countries in the event of war, collect their debts and settle their affairs, and depart freely "carrying off all their effects without molestation or hindrance."

Since this provision in the treaty referred to the conduct of the countries in the event of war, the treaty provision was not revoked by the Declaration of War, and it was held to be in force and binding upon the United States by the Supreme Court of the United States in *Stoehr* v. *Wallace,*[7] but Mr. Justice Vandeventer, speaking for the Court on the interpretation of Article XIII, said:

> "The treaty provisions relied on (Articles XXIII and XXIV) relate only to the rights of merchants of either country 'residing in the other' when war arises, and therefore are without present application."

In October, 1917, Congress passed the Trading with the Enemy Act directing the seizure of enemy properties by a Custodian having the powers of a common law Trustee, to be disposed of at the end of the War in the discretion of Congress. Congress promptly (March, 1918) amended the Act so as to vest complete ownership and management of all property in the Custodian with power of sale at public auction to the highest bidder, purchasers being limited to American citizens.

Proceeds from the sale of the property were required to be turned over to the Secretary of the Treasury.

The Versailles Peace Treaty provided for the final disposition of private enemy property or its proceeds held by France and Great Britain. A Mixed Arbitral Tribunal was set up by the treaty to determine the amount owed by Germany to British and French Nationals and all income from the liquidation of the property and all money held at the time of the treaty was to be held by France and Great Britain as a guarantee of the payment of the claims of their nationals against Germany, and any funds or assets remaining after these nationals were paid in full were to be credited to Germany as reparation payments due to the respective countries. Germany was made responsible, and assumed the liability, for the payment of her nationals whose property had been sequestrated by the Allied Powers.

These provisions of the Versailles Treaty also ran in favor of the United States, but since we did not ratify the treaty the United States technically

[7] Stoehr v. Wallace, 255 U. S. 239.

was at war with Germany until the Treaty of Berlin, which was signed in 1921. Under the provisions of this treaty the United States was given all the rights and privileges of the signators of the Treaty of Versailles relating to the disposition of seized enemy properties and its proceeds.

The Congress of the United States expressly ratified and approved this treatment of the enemy property. The following explanation of the treaty was made to the Senate by Senator King:

> "The Versailles Treaty provided for the expropriation by Germany of the property of its nationals which had been seized by the Allied and Associated Powers. The property in the hands of the Alien Property Custodian, by the terms of the Versailles Treaty, became subject to another foreign authority, namely the German Government. That is to say, the German Government in effect declared that it seized the property or the use of the property which was in the hands of the Alien Property Custodian and authorized the United States to hold the same until Germany made suitable provisions to pay the claims of the United States and its nationals. The Berlin Treaty was the assertion of the sovereign power of Germany, and the latter can by that treaty expropriate the use, if not the corpus, of the property owned by German Nationals and in the possession of the Alien Property Custodian."

Senator Willis said:

> "I am contending that we are holding this property not under confiscation but under a right that came to us by the treaty, as it found expression in the Knox Resolution, and this fight that is made here to release this property ought to have been made against the Knox Resolution."

Under strong pressure, Congress passed the Winslow Act in March, 1923, providing for the full return of all claims of property of $10,000 or under, and payments to other former owners at the rate of $10,000 annually. Up to December 31, 1928, 31,571 claims were recognized under the Winslow Act and the amounts paid back as of that date were $55,866,002.19.

Congressman Cordell Hull, of Tennessee, (who later became Secretary of State and has been quoted as favoring the return of enemy property), joined with John Nance Garner, of Texas (later Vice-President of the United States), in denouncing the arguments for the payment of compensation to German interests, declaring it to be "a stupendous steal—the greatest in the history of this Country."[8]

---

[8] Hearings before subcommittee of the Committee on Ways and Means, sitting in conjunction with the subcommittee of the Committee on Interstate and Foreign Commerce, on H.R. 10820, 69th Congress, First Session, April 1926.

Compromise legislation, known as the Settlement of War Claims Act, created a special fund in the hands of the Treasury, such funds being derived from various sources, including interest on the money and property held by the Custodian prior to the passage of the Winslow Act, twenty percent of the principal of German private property, one-half of the amount which had been appropriated to pay for the requisitioned property of the German citizens, and the receipts from the two and one-quarter percent that the United States was to receive under the Dawes Plan. Out of these aggregate funds American claims under $100,000 including interest were to be paid in full and payments of $100,000 were to be made on all American claims over that amount, while citizens of Germany were entitled to eighty percent of the money or property which had belonged to them and which was held by the Custodian, and for the balance of twenty percent they were to receive participating certificates bearing interest at five percent redeemable by the Treasury as rapidly as Germany made settlement for the American claims.

Germany thereafter defaulted on its payments to the United States, and Congress, in 1934, by the adoption of the Harrison Resolution, prohibited any further payments or releases of property to former alien enemies. Except for this deviation under great political pressure, the United States followed the principle of holding and applying enemy properties to the satisfaction of the claims of its nationals and for reparation claims against the defeated enemy in the settlement after the First World War.

IV

From the end of the First World War and to the beginning of World War II the United States made no treaties containing guaranties for the protection of enemy property, merchants or otherwise. It is clear therefore that when the United States and its allies came to a settlement with the Axis enemy at the end of World War II, the United States was free to negotiate a treaty with its defeated enemies relating to the payment of claims and reparations and to the disposition of enemy property seized and vested by the Alien Property Custodian in accordance with the previous practice of nations, previous treaties between nations, the declarations of sovereigns, Court decisions, and the opinion of authoritative writers—these being the criteria of international law.

No one familiar with either the principles or precepts of international law would deny that the vested properties had been lawfully seized, that absolute title rested in the United States, that the Axis nations were required to either pay or make provision for the payment of war claims and reparations, and that the rules of international law not only permitted but required settlement of these matters to be embraced in the treaty of peace.

All of these principles were well stated by Chief Justice Chase in *Ware* v. *Hylton,* in the following language:

"I apprehend that the treaty of peace abolishes the subject of the War,

and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the War, can ever be revived, or brought into contest again. All violences, injuries, or damages sustained by the Government, or the people or either, during the War, are buried in oblivion; and all those things are implied by the various treaties of peace; and therefore not necessary to be expressed.

"Hence it follows, that the restitution of, or compensation for British property confiscated, or extinguished, during the War, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaties, they could not be agitated after the treaties, by the British Government, much less by her subjects in Courts of Justice."

The agreement between the United States of America and other governments, opened for signature at Paris January 14, 1946, signed for the United States of America on the same date and entered into force January 24, 1946, established the Inter-Allied Reparation Agency and divided reparations due by Germany into shares on a percentage basis, that of the United States being 28%, The United Kingdom 26%, and France 16% of Category A. German assets which had been seized and vested by the United States and its allies were valued according to a formula and charged against each nation's reparation account.

This agreement further provided:

"ARTICLE VI

"GERMAN EXTERNAL ASSETS

"A. Each signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets (net of accrued taxes, liens, expenses of administration, other inland charges against specific items and legitimate contract claims against the German former owners of such assets)."

In the subsequent Convention on Relations between the Three Powers and the Federal Republic of Germany signed at Bonn, on May 26, 1952, the Federal Republic of Germany exercised its recognized right under international law to expropriate the external properties of its nationals, agreeing to compensate them for such properties in German marks, and expressly agreed that the United States and its allies might retain its seized external properties, including those in neutral countries, in satisfaction of all claims for reparations.

Article V of the Bonn Convention provided, as follows:

"The Federal Republic will insure that the former owners of property

seized pursuant to the measures referred to in Article II and III of this Chapter shall be compensated."

Claims of German nationals who are subject to the jurisdiction of the Federal Republic were prohibited from being asserted against countries which have signed or acceded to the United Nations Declaration of January 1, 1942, or nations which had been at war with Germany, or against the nationals of such countries. Claims of any description arising out of actions taken or authorized by the Governments of such countries between September 1, 1939 and June 5, 1945, because of the existence of a state of war in Europe, were prohibited.

When the Bonn Convention failed to become fully effective because of the refusal of the French Government to approve the European Defense Community Arrangement, meetings were held in London and Paris in October 1954 at which an agreement was reached between the French, British and American Governments which was later ratified and approved by the Federal Republic of Western Germany. Under this agreement the provisions of the Bonn Convention relating to reparations and German external assets were approved by specific reference, so that such agreements are presently in full force and effect.

Is non-return of enemy properties confiscatory under these circumstances? Confiscation is the taking of private property without compensation. Acting under long-recognized rules of international law, Germany has agreed that we may retain the enemy properties in consideration of our surrender of claims for reparations. Germany has, in turn, agreed that it will pay its own nationals for their property which it has thus expropriated.

International law sanctions the right of a nation to expropriate the external assets of its own nationals and to compensate them therefor in its own currency. May German nationals assert that payment to them by their own country in their own currency, as compensation for their properties, constitutes confiscation? If so, confication by whom? Certainly not by the United States which legally seized and vested the properties and then agreed to retain them in lieu of lawful claims for reparations. By avoiding the payment of reparations, which could come only out of the German economy, German nationals lifted a lien from their own private properties greatly in excess of the value of the enemy assets—in other words they made a most favorable settlement in strict accord with the accepted practice among nations.

At the outbreak of World War II the European Governments made it abundantly clear that they regarded the dollar holdings of their nationals as public property, subject to seizure against reimbursement in local currency. The British, for example, mobilized their dollar resources to provide for their national defenses, and vested and sold securities of their nationals in the United States in the amount of approximately $600,000,000. They sold an important American corporation which belonged to British nationals. They took from their nationals other securities and lumped them

together with governmental holdings as security for the $425,000,000 RFC Loan which we extended to them. In every case the nationals concerned were compensated by the British Government in pounds sterling.

External investments in foreign countries are no longer private property. A distinguished Dutch lawyer[9] has recently declared:

> "The private owner is nowadays nothing but a Trustee on behalf of his Government."

Under the Nazi national policy Germany's external investments were not private property as we know it, but were instruments of national policy. In the early 1930s government controls were established by the Nazi regime over external investments and these controls were so drastic that they for all practical purposes destroyed the private character of such investments. The Nazi plan for world conquest was quite different from the ancient warfare which divided populaces into combatants and non-combatants and the property of warring nations into war material and peaceful private property. Hitler planned total war, including armies, navies and properties. Hitler's views were the same as those of Secretary of State Lansing, who, in speaking of the legal aftermaths of World War I, said:

> "In the past . . . the non-combatants of the populations have formed a class which was without military value and which was on that account free from hostile attacks; this great war has been a war of peoples, and not a war of armies and navies alone."

That it was also a war where external assets were hostile is substantiated by the report of the Alien Property Custodian in 1919 where, in discussing German investments in the United States, it was stated that these properties were "in a sense hostile, they constituted Germany's great industrial army on American soil . . . In many cases the factories, warehouses and offices of enemy-owned concerns were spy centers before America entered the World War, and would have been nests of sedition if the Alien Property Custodian had not acted promptly. . ."

V

Those who favor return of the seized enemy properties frequently argue that it is inconsistent for the United States to advance billions of dollars to Germany for economic aid and at the same time retain $450,000,000 in assets belonging to the individual citizens of these countries. The contention is that the withholding of restitution to former individual owners creates international ill will, and undermines our otherwise favorable position resulting from economic aid.

Such arguments overlook the fact that by returning the properties the

[9] Professor M. H. Bregstein. Netherlands, October 21, 1950.

United States would engage in a unilateral violation of international agreements with its allies and thus put our allies in a weakened position to withstand similar demands for return which they can ill afford; they further overlook the admitted fact that approximately seventy percent in value of all the properties involved would go to Swiss or other corporations, who are in reality representatives of large business enterprises, including the former I. G. Farben Industrie. The real proponents of return are the agents and representatives of Interhandel (formerly I. G. Chemie) who are now and have for many months been in the United States seeking to create a favorable climate for the return of such properties as General Aniline & Film Corporation.

The Alien Property Custodian vested approximately 34,000 properties during World War II and ninety percent of these vested properties were valued at less than $10,000. If the United States deems it advisable to purchase additional good will in the Federal Republic of Germany, it may do so with a total expenditure of approximately $70,000,000 by paying sums up to $10,000 to the former owners of these properties and this would entirely satisfy the claims of ninety percent of the former owners and would call for an expenditure of only fifteen percent of the total value of all vested properties. There are approximately 358 persons and firms whose vested property is worth more than $100,000. These firms and persons constitute approximately one percent of the total number of former owners of vested property. There are forty-six persons and firms each of whom had property worth more than $1,000,000. Full return to these forty-six former owners would alone require an expenditure of $239,000,000.

It would seem from these figures that if the prime purpose of return is the generation of good will, the better policy would be to return up to $10,000 to each owner as this would, at a reasonable expenditure, reach the great mass of former individual owners of vested property. On the other hand, a general return of all properties or their proceeds would call for an expenditure of approximately $450,000,000, which would necessarily have to be appropriated out of tax funds paid by the citizens of the United States, primarily to benefit Swiss corporations who have stoutly maintained in our courts that they are not German owned or controlled.

It could hardly be argued that the return of General Aniline & Film Corporation with a book value of $90,000,000, and the $29,000,000 proceeds from Schering Corporation, plus the additional $15,500,000 proceeds from the sale of American Potash & Chemical, to Swiss cloaks would better our relations with the individual citizens of the Federal Republic of Germany.

It must be conceded, of course, that Congress has the power to order the return of all properties notwithstanding the agreements with Germany and with our allies. But if this is done, and the consideration moving from Germany to the United States and its allies is to be destroyed, should not the whole agreement fall? And under general equitable principles should not the claims of the United States for reparations be immediately reinstated and

immediately enforced? Would this create better relations between the United States and the Federal Republic?

If unilateral repudiation of our multilateral reparations agreement occurs, then quite naturally a demand will arise from Germany for the return of all the other external properties now held by our allies. The financial drain of the war on our allies forced them to liquidate many of their foreign holdings to finance their war efforts. Unlike Germany, they were unable to place their overseas assets in a sanctuary. If the United States takes unilateral action which would preserve the assets of the aggressors, enhanced tremendously in value by the war efforts of the United States, any possible good will which could be secured by giving Germany an additional half billion dollars would be insignificant when weighed against the injury which would be done to the reputation and standing of the United States with the other signatories of the multilateral agreements under which enemy properties are to be retained in lieu of reparation.

What about the interest of the American taxpayer? $225,000,000 representing proceeds of properties that have been disposed of by the Alien Property Custodian has already been paid to the War Claims Commission pursuant to an act of Congress and has been disbursed to the beneficiaries of the War Claims Act of 1948. Some $40,000,000 has been spent for administrative expenses by the Office of Alien Property since 1941, and these funds can only be replaced by the United States taxpayer through appropriations made by Congress. If this occurs then Germany will escape responsibility for the damage arising out of its aggression, and the costs will be completely shifted to American taxpayers.

It would seem that our generosity amounting to approximately three billion dollars in economic relief for the purpose of rehabilitating Germany—every penny of which came from the American taxpayer—should be sufficient to convince the world that any moral obligation that might exist with reference to the enemy's property has been satisfied.

What about patents? The return of exclusive patent rights, along with those that would go with the properties themselves, would include not only those patents existing at the time of seizure but also those issued subsequent to vesting based on research conducted under American operations, all of which are now available to and are being used by American industry under licenses subject to cancellation. The return would benefit mainly the I. G. Farben interests of Germany, and enable them to cancel American licenses and thereby deprive American industry of their further use.

The former president of General Aniline & Film Corporation in recent Senate Subcommittee hearings testified:

> "At the time of seizure GAF's portfolio of patents, practically all of which were derived from Farben, consisted of about 4,200 United States patents and applications. These represented, among other things, a suggestive technical backlog from which GAF's Research

and Development Department could draw as it came into being and grew. All of the patents in this category have been made available by licensing on reasonable terms subject to negotiation.

"In addition to servicing these patents, our Patent Department has since filed a total of 4,300 United States and foreign patent applications and some 1,300 trade mark applications. Along with its substantial domestic activity in negotiation of licences, rendering opinions on infringement, patentability, and various other problems, it was also confronted with a unique foreign problem. Under German control the foreign market and the foreign counterparts of GAF patents and trade marks were retained by I. G. Farben. This necessitated exploring the barriers and opening the export channels to GAF products as well as the creation of an entirely new foreign trade mark and patent position as quickly as possible. This too has been substantially accomplished and GAF is now exporting freely to world markets."[10]

Included in these patented processes developed entirely through research under American operation, and in the event of return, destined to become the exclusive property of I. G. Farben, are products absolutely essential to the national defense, including synthetic blood plasma, materials that go into radar, instruments, detergents, rocket propellents, and particularly materials for decontamination following atomic explosions. General Aniline is the only company in the United States prepared to manufacture blood plasma substitute under existing patents and this material would be of the greatest importance if we had an atomic attack. At the present time this plasma extender is being stockpiled by the United States government, pursuant to the approval of the National Research Council (Senate Subcommittee Hearings 508–517). This stockpiling will, of course, terminate in the event of return and I. G. Farben through its Swiss subsidiary Interhandel would be free to negotiate for the exclusive manufacture of this important defense product to any other nation, including, of course, Russia, Red China, or some South American country.

It must be remembered that the enemy operating companies which were seized were not merely held in custodianship but were actually developed on the theory of retention and were given access to important American wartime developments on the theory that they were to become a part of the American owned postwar industrial structure. Many of these companies have been our fighting force in Latin America, where they have competed as American-owned companies against their previous enemy sister companies. During the war it was necessary to wage economic warfare against enemy trade with Latin America and we could not have done so successfully except with the

[10] Hearings, Subcommittee of Com. on Judiciary. U. S. Senate, 83rd Congress, pp. 517–18 (First Session) (March 19, 1953).

clear understanding that the enemy-owned firms seized by the Custodian were throughout the entire time understood to be American companies that would not be returned. If we had not taken this position we naturally would not have obtained the cooperation by Latin American consumers, or the Latin American governments. If now we return these Latin American companies in their enhanced economic competitive positions, our former enemies would find that their grip on the Latin American market had been greatly strengthened by American efforts, largely at the expense of other American companies which might otherwise have absorbed part of the market lost by reason of the enemy blockade.

VI

Fifteen years before Pearl Harbor the Supreme Court of the United States broadcast to the world that the Alien Property Custodian was not a trustee but was an owner vested with powers of sale (U. S. v. Chemical Foundations, 227 U. S. 1). On July 3, 1948, the Trading with the Enemy Act was amended by Congress so as to expressly provide in Sec. 39 that no property or interest therein of Germany, Japan, or any other enemy country "shall be returned to former owners thereof, or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." The Alien Property Custodian, under these circumstances, would have been derelict in his duties had he looked upon himself merely as a trustee who had seized the properties for the sole purpose of preservation and return. Under government ownership these properties were constantly improved, developed and expanded with many new acquisitions. The companies involved were strengthened and their assets and activities were built up throughout the world. If the properties are returned now the nationals of the aggressor nations will not only have had their properties preserved but they will be greatly enhanced in value. Aside from the capital improvements dividends running into the millions will be paid over to our former enemies.

For example, the stock of Schering Corporation at date of vesting had a book value of approximately $1,300,000. At the time this stock was sold by the Custodian the book value was approximately $12,000,000, while the sale price was actually $29,000,000—an appreciation since date of vesting of almost $28,000,000 in this one company. General Aniline & Film Corporation as of date of vesting had a net worth of approximately $35,000,000. Its present estimated net worth (valuing all patents at the nominal sum of One Dollar) is approximately $100,000,000. To return the properties under these circumstances would be to provide a windfall running into millions of dollars, and would be tantamount to a notice to future aggressors that they may experiment with the world's peace without endangering the private ownership of their properties—indeed, they may recklessly go all out for war with the assurance that even if they lose the war they will reap the benefit of the enhancement of their external assets.

Such assurances would seem to encourage the aggressor nations to make war. Requiring the application of seized enemy external assets to reparations against defeated nations on the other hand would seem to be a deterrent to aggression. Under modern conditions where our all out war efforts utilize both personnel and property it would seem more logical to conclude that peace will be served if external private property of the citizens of any aggressor nation is subject to application to that nation's obligation to pay for the damage it inflicts on the people of the nation it assails. The teachings of Rousseau[11] that war is a relation solely between bodies politic and not between individuals, was repudiated as long ago as 1813 by Chancellor Kent supported by Vattel, Grotius and Burlamaqui. In that year Chancellor Kent ruled in an important New York case:[12]

> "A war on the part of the government is a war on the part of all the individuals of which that government is composed."

---

[11] Hall, International Law, 7th ed., p. 66; 2 Westlake, International Law, p. 40.

[12] Techt v. Hughes, 229 N. Y. 222 (quoted). See Griswold v. Waddington, 16 Johnson, p. 347.

Recent Decisions of the United States Supreme Court

By Edwin M. Zimmerman and John D. Calhoun

QUINN V. UNITED STATES

EMSPAK V. UNITED STATES

BART V. UNITED STATES

349. U. S. 155, 190, 219.

In these cases, decided near the end of the 1954 Term, the Supreme Court continued to fill in the details of the applicable law surrounding the pleading of the privilege against self-incrimination. Dealt with by these opinions were the following issues: how clear and forthright must a witness be in asserting his privilege; how clear and forthright must a waiver of the privilege be; by what test is the incriminating nature of a question determined. The cases also focussed on the related issue of how clearly a witness must be apprised by his interrogators that they do not accept his explanation for refusing to answer a question, in order to provide the basis for a contempt charge under 2 U. S. C. § 192 (which makes contempt of Congress a crime).

Both the *Quinn* and the *Emspak* cases arose out of an investigation by the House Committee on Un-American Activities into the activities of certain members of the United Electrical, Radio & Machine Workers of America union. Quinn was asked whether he was or had been a member of the Communist party, conceded by all to be an incriminating question. In refusing to answer, he endorsed the position taken by a previous witness. That witness had based his refusal to answer on "the First and Fifth Amendments" as well as "the First Amendment to the Constitution, supplemented by the Fifth Amendment."

Quinn was convicted of contempt of Congress in the District Court of the District of Columbia on the ground that a witness may not incorporate the position of another witness. The Court of Appeals reversed, holding that to invoke the privilege "no specific term or expression is required" and that a witness may adopt as his own a plea made by a previous witness. However, the Court of Appeals was not clear that the previous witness had in fact adequately claimed the privilege, and it ordered a new trial on that issue. Certiorari was granted, and the Supreme Court reversed the Court of Appeals and remanded the case to the District Court with directions to enter a judgment of acquittal.

Chief Justice Warren wrote the majority opinion. Only Justice Reed dissented from the Court's conclusion that the privilege had been adequately claimed. Justice Harlan concurred in the result, but dissented from a second holding made by the majority (set forth below).

The Court's opinion takes it for granted that the privilege could be invoked by adopting the claim of a previous witness. As to whether the previous witness had claimed the privilege, the Court observed that the term "Fifth Amendment" was at present commonly regarded as being synonymous with the privilege against self-incrimination. Reliance on "the First and Fifth Amendments" and "the First Amendment to the Constitution, supplemented by the Fifth Amendment" was sufficient to invoke the Fifth Amendment. "By pressing both objections, he does not lose a privilege which would have been valid if he had only relied on one."

To the Government's contention that a forthright invocation of the privilege was avoided in order "to obtain the benefit of the privilege without incurring the popular opprobrium which often attaches to its exercise," the Court replied that it is precisely during the times when stigma attaches to the exercise of the privilege that governmental bodies must be most scrupulous in protecting that exercise, and all the more ready to recognize a valid claim of the privilege.

The test set forth by the Court is whether "an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege. . ." The Court concluded that the committee was put on notice of an apparent claim of the privilege. Had the committee been in doubt about the meaning of the explanation given by the witness of his refusal to answer, it could have asked him specifically to state whether he was relying on the Self-Incrimination Clause.

Virtually the same question was presented by the *Emspak* case, except that the witness did not adopt another's claim, but himself predicated his action on "primarily the First Amendment, supplemented by the Fifth." The District Court of the District of Columbia convicted him of contempt of Congress; the Court of Appeals affirmed; and certiorari was granted by the Supreme Court. The Court reached the same result as in the *Quinn* case. Again Justice Reed dissented since he did not regard the statements made by the witness as sufficient to apprise the committee that a claim of the privilege against self-incrimination was being made. Justice Minton joined Justice Reed's dissent in the *Emspak* case.

A second ground for the Court's decision in both the *Quinn* and *Emspak* cases, and the sole ground for decision in the *Bart* case, was that the conviction for contempt of Congress had to fall because the committee involved neither specifically overruled petitioner's objection to answering, nor indicated its overruling of the objection by specifically directing petitioner to answer. The court concluded that the witness therefore was never confronted with a clear choice between compliance and contempt, and absent the

knowledge that his answer was demanded despite his objections, his refusal to answer lacked the criminal intent requisite to conviction for contempt. (Although the witness in the *Bart* case declined to answer on grounds of lack of pertinency of the questions rather than on the basis of self-incrimination the issue as to intention was the same.) Justices Reed, Minton, and Harlan all were of the opinion that the record of the colloquies between witness and committee in each of these cases showed that each witness was adequately apprised that his explanation for not answering was not acceptable. Justice Harlan went even further and suggested that a refusal to answer even though accompanied by an explanation immediately constituted a prima facie violation of the contempt statute even before the committee passed on the acceptability of the explanation.

The *Emspak* case had two other issues in it: whether there had been a waiver of the privilege and whether the questions asked were incriminating. As to the waiver point, the Court held that the testimony on which the Government relied was equivocal, and that in order to effectuate a waiver of a fundamental constitutional right, the witness' statement must be unambiguous.

The issue of whether the questions asked Emspak were incriminating was apparently raised for the first time by Justice Harlan, who discussed it in his dissent. The Government had conceded that the questions were incriminating. Fifty eight of the questions in effect asked Emspak to state whether he was acquainted with certain individuals and whether those individuals had ever held official positions in his union. Justice Warren, writing for the Court, looked at the setting of the questions and noted that the conviction of the 11 Communist leaders under the Smith Act had occurred only two months prior to the witness' appearance before the committee, that there were reports that Smith Act indictments against other Communist leaders were being prepared, and that newspapers had carried the story that the Department of Justice was soon to take an important step toward the criminal prosecution of the witness in connection with his non-Communist affidavit filed with the National Labor Relations Board. He also noted that each of the named individuals asked about in the fifty-eight questions had previously been charged with having Communist affiliations. In view of this setting, he concluded:

> "To reveal knowledge about the named individuals—all of them having been previously charged with Communist affiliations—could well have furnished 'a link in the chain' or evidence needed to prosecute a petitioner for a federal crime, ranging from conspiracy to violate the Smith Act to the filing of a false non-Communist affidavit under the Taft-Hartley Act."

Justice Harlan did not agree that in fact the fifty-eight questions were incriminatory. He suggested that the Court had been straying from its traditional test that to be incriminating the question must present a live danger and not an imaginery possibility of danger to the interrogated witness. Justice Harlan wanted the Court to look at the background facts not merely

to determine whether questions, innocent on their face, were in fact dangerous to the witness, but also for the purpose of determining whether questions, dangerous on their face, were in fact harmless to the witness. To Justice Harlan, the background facts in the *Emspak* case rendered any incriminatory possibilities of the questions void, since Emspak, as a Union official, was being asked whether the other individuals held positions in the Union and, as to some of them, whether he knew them personally.

> ". . . it is difficult to see how the fact that Emspak knew some of these people or what position each held in the Union can rationally be said to support even an inference that he knew of their alleged communist affiliations, much less tend to prove that he himself had taken part in a conspiracy to advocate the forcible overthrow of the Government or had falsely sworn that he was not a communist. Nor could the answers to the questions have been of material assistance in providing leads to evidence to be used against him. Investigators presumably would already know that the Secretary of the Union knew other Union officials."

* * *

On two of the above issues—that of the adequacy of the claim of the privilege, and the adequacy of the apprisal of the witness that his objection to answering was not acceptable to the committee—different conclusions were reached on the basis of the same record, purportedly examined according to the same standards. Among other things, the discrepancy in conclusions in part reflects the different values ascribed by different Justices to the privilege against self-incrimination and, perhaps, to the investigating work of the congressional committee involved. Hence, whereas Chief Justice Warren refers to "the great right which the Clause was intended to secure . . ." Justice Reed states he was led to dissent because of "the importance of preserving the right to require evidence, except when a witness definitely apprises the interrogating body of a valid claim of privilege. . . ."

As a practical matter, a committee counsel in the future should have no difficulty in avoiding problems dealt with in these cases. A specific question to the witness on whether he relied on the privilege against self-incrimination, and a specific overruling of his objection would satisfy the strictures of the majority opinion.

Of more potential significance is the suggestion, now rejected, of Justice Harlan as to the standard for testing the incriminating nature of questions. Looking to the setting for the purpose of concluding that questions, seemingly incriminating, are capable of a non-incriminating explanation, can be a risky business—risky, at any rate, to the witness who may subsequently learn that the non-incriminatory explanation perceived by one judge was not perceived by a subsequent official, or was demolished by additional evidence. It is in this area that a significant diminution of the protection afforded by the Clause can occur should other Justices, in the future, be converted to Justice Harlan's point of view.

CARROLL V. LANZA

349 U.S. 408

Petitioner, Carroll, a construction worker, and intervenor, Hogan, the employer of Carroll and a subcontractor, were residents of Missouri. Carroll made his contract of employment with Hogan in Missouri. Under that contract, Carroll performed work in Arkansas. There he was injured. On his return home, Missouri, under her Compensation Act, automatically made 34 weekly compensation payments to Carroll. Throughout that period, Carroll was unaware of his rights under Arkansas law. The Missouri Compensation Act, which is applicable to injuries received either within or without that state, provides that its rights and remedies:

> "shall exclude all other rights and remedies [on account of injury or death] . . . at common law or otherwise."

Before his receipt of Missouri compensation had become final, Carrol brought suit in the courts of Arkansas for common law damages against respondent, Lanza, the prime contractor. Lanza, a resident of neither Missouri nor Arkansas, removed the case to the Federal District Court. That court ultimately gave judgment for Carroll. 116 F. Supp. 496. The Court of Appeals for the Eighth Circuit reversed that judgment on the ground that the Full Faith and Credit Clause of the Constitution of the United States barred recovery. 216 F. 2d 808. Certiorari was granted by the Supreme Court (348 U.S. 870) to resolve those doubts "as to the correctness of the decision raised by *Pacific Employers Ins. Co. v. Commission*, 306 U.S. 493."

The Supreme Court, in an opinion by Mr. Justice Douglas, reversed. Mr. Justice Frankfurter filed a dissent in which he was joined by Justices Burton and Harlan.

The majority opinion, although conceding that a home state has a right, if she chooses, to make her Compensation Act exclusive and to enforce it as she will within her borders, declines to extend the reach of such control to affect the compensation policies of any sister states in which actual injury has been inflicted on non-resident workers. Of such a sister state, the Court observes:

> ". . . Her interests are large and considerable. . . . The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these . . . A state that legislates concerning them is exercising traditional powers of sovereignty. . . ."

The majority conclude, therefore, that the Full Faith and Credit Clause does not demand that:

> "[T]he State where the injury occurred . . . be powerless to provide

any remedies or safeguards to nonresident employees within its borders."

The dissenters raise two objections. They urge, first, that a contrary decision in this case is required by *Bradford Electric Light Co. v. Clapper,* 286 U.S. 145, and, second, that the Court, if not unnecessarily, at least prematurely, has here reached for the Constitutional issue. The *Clapper* decision held that relief in a suit brought in a Federal Court in New Hampshire against a Vermont employer by his Vermont employee to recover for an injury suffered in the course of his employment while in New Hampshire, was governed by the Vermont Compensation Act rather than the provision of the New Hampshire Compensation Act which permitted the employee, at his election, to enforce his common law remedy. In the *Pacific Employers Ins. Co.* case, the Court held that the *Clapper* rule did not apply in a situation where the exclusive remedy of the home-state Compensation Act was "obnoxious" to the compensation policy of the state of injury. The instant case would seem to excuse any need to use that talismanic word.

The dissenters' second objection is based upon a reading of the cases interpreting the Missouri Compensation Act. According to that reading, the dissenters think it likely that the Missouri courts would allow a suit by a subcontractor's employee against an ordinary third party, i.e., against the prime contractor, Lanza. If that were so, there would be no need to reach the Constitutional issue. Thus, the dissenters now would remand the case to the Court of Appeals with instructions to determine the correct reading of Missouri law.

LAWLOR V. NATIONAL SCREEN SERVICE CORP.

349 U.S. 322

This case involves application of the doctrine of *res judicata* to treble damage suits for alleged violation of the federal antitrust laws.

Petitioners are lessors of advertising posters to motion picture exhibitors. In 1942, they brought an antitrust action for treble damages and injunctive relief against respondent, National Screen, and three motion picture producers. National Screen had been granted exclusive licenses by those producers to manufacture and lease motion picture advertising posters. Petitioners alleged that the defendants had conspired to establish a monopoly in the distribution of motion picture advertising material.

In 1943, that action was dismissed "with prejudice" after a pre-trial settlement and without any findings of fact or law having been made. Thereafter, sublicenses were granted by National Screen to the petitioners.

In 1949, petitioners brought a second treble damage action against the

same defendants, plus five additional motion picture producers. In their new suit, petitioners alleged that the settlement of the 1942 suit had been a device of the defendants in that case to perpetuate their conspiracy and monopoly; that the five additional producer-defendants had since joined the conspiracy; and that National Screen had acted to destroy petitioners' business. Damages were sought for only those injuries sustained after the 1943 judgment.

In 1953, respondent, National Screen, moved to dismiss the action on the ground that the 1943 judgment was *res judicata*. The District Court granted the motion, and the Court of Appeals for the Third Circuit affirmed. 211 F. 2d 934. Certiorari was granted by the Supreme Court "because of the importance of the question thus presented in the enforcement of the federal antitrust laws." 348 U.S. 810. In a unanimous decision (Mr. Justice Harlan not participating in the consideration or decision) the Supreme Court reversed.

The Court declared, in an opinion by the Chief Justice, that, since the 1943 judgment "was unaccompanied by findings," it could not bind the parties on any issue which might arise in connection with another cause of action. The Court then declared that the 1942 and 1949 suits were not based on the same cause of action. They deemed it not decisive "that both suits involved 'essentially the same course of wrongful conduct.' " It was noted that the conduct presently complained of had occurred after the 1943 judgment and that new antitrust violations had been alleged, i.e., deliberately slow deliveries and tie-in sales, among others. Conceding that the 1943 judgment precluded recovery on claims arising prior to its entry, the Court concluded that "it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the 1942 case."

The Court also rejected respondent's novel contention that petitioners' failure to press for and procure injunctive relief in the 1942 suit barred petitioners thereafter from complaining of acts that might thereby have been enjoined. The Court properly notes that this thesis in effect would confer upon respondent "a partial immunity from civil liability for future violations" and that "[S]uch a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*."

The Court concludes by setting forth a second basis for decision as to the five defendants who were not parties to the 1942 suit. The Court notes that those defendants "do not fall within the orthodox categories of privies; that they could not have been joined in the 1942 case since they did not even enter the alleged conspiracy until after the judgment on which they now rely; that in any event there was no obligation to join them in the 1942 case since as joint tortfeasors they were not indispensable parties; and that their liability was not 'altogether dependent upon the culpability' of the defendants in the 1942 suit." Those considerations placed the five defendants outside the scope of the doctrine of *res judicata*.

Correction by Joseph Barbash and Robert B. von Mehren

In our review of *Regan* v. *The People of the State of New York* at page 283 of *The Record* for June, 1955, we observed:

> "Although Mr. Justice Reed was joined by only Justices Burton and Minton, his opinion states that it is 'the opinion of the Court.'"

This observation was based on the fact that 8 justices sat on the case and that in the slipsheets and in United States Law Week (23 L.W. 4187) Mr. Justice Frankfurter was reported as concurring "in the result," Justices Black and Douglas as dissenting, and the Chief Justice, joined by Mr. Justice Clark, as stating in his concurring opinion:

> "I concur in the judgment of the Court."

It has been brought to our attention that in the official report the Chief Justice's concurring opinion reads instead:

> "I concur in the opinion of the Court." 349 U.S. 58, 65 (1955).

Thus Mr. Justice Reed's opinion was joined by four justices and it is, of course, the opinion of the Court.

Recent Decisions of the New York Court of Appeals

By Sheldon Oliensis and Joseph H. Flom

Rosenfeld v. Fairchild Engine and Airplane Corporation

(309 N.Y. 168, 128 N.E. 2d 291, July 8, 1955)

The Court of Appeals, splitting four to three and writing three opinions, has handed down an important decision on the reimbursement of the expenses of a proxy fight. The opinions disclose a wide split in the Court as to the criteria to be applied in determining what expenses are permissible.

After a hard-fought proxy contest, an insurgent group had ousted the management of the defendant corporation. Plaintiff brought this stockholder's derivative action to compel the return to the corporation of some $261,000 paid to both sides as reimbursement of their expenses in the proxy fight. Dismissal of the complaint by the Official Referee was unanimously affirmed by the Appellate Division.

The old board while still in office had spent $106,000 of corporate funds in the proxy fight. An additional $28,000 so spent was reimbursed to them by the new board after the change in management. The insurgents, after taking control, were paid $127,000 to cover their own expenses, and this latter payment was ratified by a 16 to 1 vote of the stockholders. No stockholder vote was taken on reimbursement of the old board. Plaintiff's counsel conceded that the charges, if legal, were "fair and reasonable" in amount and did not challenge any specific items of expenses.

In affirming the decision of the Appellate Division, the majority, through Judge Froessel, stressed that the dispute between the new and the old boards was not a "purely personal power contest," but "went deep into the policies of the company." Chief of these policy differences, the Court noted, was a dispute over a long-term salary and pension contract with a director of the old board who was the corporation's principal executive officer.

The majority felt that, if directors could not freely answer the challenges of outside groups and in good faith defend their actions with respect to corporate policy for the information of the stockholders, they and the corporation would be at the mercy of persons with ample funds who might seek to wrest control of the corporation from them. The majority felt that the test was clear: when directors act in good faith in a contest over policy, they have the right to incur reasonable and proper expenses for solicitation of proxies and in defense of their corporate policies. Moreover, payment of "reasonable and bona fide expenses" to a successful insurgent group was also proper, provided the stockholders approved such payments.

If, however, moneys are spent for "personal power, individual gain or private advantage" and not in the belief that such expenditures are in the corporation's best interests, or if the fairness and reasonableness of the amounts expended are duly challenged (as they here had not been), courts will not hesitate to disallow such expenses.

Judge Desmond concurred in an opinion based on the limited ground that there had been a failure of proof which justified dismissal of the complaint. Some of the expenditures in the proxy fight on their face were reasonable and were made for lawful purposes, but there was no evidentiary basis for determining the lawfulness or reasonableness of certain other expenses. The burden was on the plaintiff to go forward by attacking such items; having failed to do so, plaintiff failed to make out a *prima facie* case.

While Judge Desmond doubted that the record raised the broad question of the legality of payment of proxy fight expenses, he felt that the problem was answered by a previous Court of Appeals decision, from which he quoted at length. Significantly, the language quoted seems substantially more restrictive in permitting payments than the language used in the majority opinion in the instant case.

Finally, Judge Desmond commented that, if expenditures did not meet the test of propriety, it was no defense that they had been approved by a vote of the stockholders or that the change in management was good for the corporation. Thus, it is implicit in the result reached by Judge Desmond that payment to insurgents may be proper under some circumstances, even in the absence of stockholder approval.

The dissenters, in an opinion by Judge Van Voorhis, expressed the belief that the old directors should be ordered to restore to the corporation part, and the new directors all, of the proxy expenses reimbursed to them.

The only expenses properly reimbursible to the old board, the dissenters stated, were those "reasonably related to informing the stockholders fully and fairly concerning the corporate affairs." The dissenters noted that among the expenses here reimbursed were those for entertainment, chartered airplanes and limousines, public relations counsel and proxy solicitors. Without questioning the legality of such measures, the dissenters felt that most of such expenses could not properly be paid out of corporate funds.

The dissenters noted also that the Appellate Division had concluded that the management group had incurred a substantial amount of needless expense which was charged to the corporation. Given this conclusion, the burden was upon the directors to justify these expenses. Plaintiff's failure to segregate the *ultra vires* expenditures did not justify dismissal of the complaint, once plaintiff had proved facts from which an inference of impropriety might be drawn.

The touchstone of the dissent apparently is that directors are entitled to reimbursement only to the extent that they had a *duty* to make the questioned expenditures. Thus the incumbent directors had a duty to acquaint the stockholders with essential facts concerning the management of the

corporation and were entitled to reimbursement for expenses so incurred. The existence of a proxy contest, the dissent indicated, might warrant circularizing the stockholders with more than ordinarily detailed information. Beyond these limits, however, any expenditures were *ultra vires* and could not be reimbursed.

The dissent rejected as "impractical" and "unreal" the distinction drawn by the majority between issues relating to policy and those relating to personnel. It is generally impossible, the dissenters felt, to distinguish which of these elements is dominant. The dissent noted that in this case the chief dispute related to an employment contract with a director of the old board.

Since the insurgents were not charged with responsibility for operating the company, they were not entitled to reimbursement under any theory, short of unanimous stockholder approval. A non-unanimous stockholder vote, however large, could not ratify expenditures which were *ultra vires*. The dissent noted particularly that, under the majority opinion, success—not the merits of the controversy—was the indispensable condition upon which reimbursement of insurgents depended.

The case is interesting because of the narrow division in the Court and the widely divergent views expressed. It establishes a rule, apparently new in New York, that proxy expenses of insurgents may under some circumstances be reimbursed. While the main opinion rests its holding to this effect on the stockholder approval of such reimbursement, somewhat paradoxically the case also seems to establish the rule that a less than unanimous vote of stockholders cannot immunize from attack expenditures which would otherwise be improper—a point on which Judge Desmond apparently agreed with the three dissenters. In the absence of stockholder approval, Judge Desmond would apparently permit reimbursement of insurgents under certain circumstances; it is, however, not clear whether or not the three judges who subscribed to the main opinion would concur in such a result.

Moreover, with respect to reimbursement of both old and new directors it is by no means certain that Judge Desmond would accept the lenient test enunciated by the main opinion. Despite the broad language of the main opinion, therefore, corporate directors may still be called upon in future cases to justify their expenditures under the more restrictive rule of the older decisions.

ARON V. GILLMAN

(309 N.Y. 157, 128 N.E. 2d 284, July 8, 1955)

The Court of Appeals has handed down a decision with respect to the computation of the "book value" of stock, which represents a significant modification of the rule enunciated in prior New York cases.

Plaintiff and defendant's intestate, joint owners of a corporation, agreed

that, on the death of either, his stock was to be sold to the survivor "at the book value thereof." The book value was to be determined by the most recent audit of the corporate books, provided such audit had been made within sixty days prior to death.

Defendant's intestate died less than sixty days after an audit of the corporate books. When the administrator refused to perform the stock purchase agreement, plaintiff brought this action for specific performance.

Special Term granted specific performance and fixed the purchase price of the stock of defendant's intestate at $186,000. The Appellate Division affirmed, one judge dissenting on the ground that the valuation was incorrect. On plaintiff's appeal, the Court of Appeals, through Judge Froessel, held in a five to two decision that the computation of the value was erroneous and modified the judgment below accordingly.

Two items were in dispute: whether, in determining the purchase price of the stock, the actual value of inventory should be used, rather than the value appearing in the books, and whether taxes (which had not been accrued on the books) should be deducted.

A. *Inventory*

Among the current assets listed in the balance sheet was "Merchandise Inventory Estimated . . . $12,001.15." Plaintiff conceded that a post-death physical inventory had revealed an actual inventory value in excess of $51,000. The majority held, as had Special Term and the Appellate Division, that it was "not obliged to follow blindly entries in books that are indisputably untrue." Accordingly, the Court held, the higher figure should be used in determining "book value."

B. *Taxes.*

While taxes were not accrued on the books, the corporation's balance sheet carried a notation that it was subject to federal and state income taxes. The profit and loss statement and the schedule of surplus account carried similar notations. Over $53,000 in taxes was applicable to the period from January 1 to July 31 (the date of the audit). Both Special Term and the Appellate Division had refused to deduct this amount in determining "book value."

The majority pointed out, however, that ignoring of the taxes until actually payable would mean an arbitrary and widely fluctuating purchase price, depending upon the date of the audit. An audit made shortly before taxes became payable would include no taxes whatever in the computation of book value, whereas an audit taken several days later would show the book value to have dropped by an amount equal to the income taxes for the entire year. Such result, the Court held, was manifestly unreasonable.

Judge Desmond dissented in an opinion in which Judge Fuld concurred. The dissenters pointed out that the stock purchase agreement provided that, if either of the joint owners wished to sell his stock while both were alive, the

price was to be the "actual value," but that "book value" was made determinative in the event of the death of either. Because of the notations which appeared on the books with respect to taxes, the dissenters agreed that it was proper to deduct such taxes in determining the book value. However, with respect to inventory, the dissenters were of the opinion that, in the absence of fraud or mathematical error, the figure appearing on the books should be used. They noted that book value is always an "unfair" measure since it is always higher or lower than actual or market value. However, since the parties had agreed on this measure, it should be applied.

This is apparently the first New York decision to apply figures other than the book entries in determining "book value." The case puts on notice draftsmen of stock purchase and similar agreements that there may be danger in the future in relying solely on that phrase as a definitive standard of valuation.

Committee on Professional Ethics

OPINION NO. 807

CONFLICT OF INTEREST

Question—You have represented "A" in various matters for about two and one-half years without receiving pay, so that it became necessary to institute suit against him for work done. During the period in which you represented "A" he formed a partnership with "B." You did no work for them in connection with the partnership. In fact, you had no knowledge that the partnership existed. Recently "B" has asked you to represent him in his differences with "A." You asked whether you may at this time represent "B" in his action against "A."

Opinion—The last paragraph of Canon 6 reads as follows:

> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

If there is any possibility, however remote, that in your representation of "A" you acquired information about "A" and his affairs that would be of aid to you or "B" if you were now to represent "B" in his controversy with "A," then your representation of "B" would be improper. If there is no such possibility, it would be proper. See also Canon 37.

Editor's Note: The opinions of the Association's Committee on Professional Ethics and those of the New York County Lawyers' Association will shortly be published in one volume. The volume will be kept current by the publication of the Committee's opinions from time to time in THE RECORD. It is also contemplated that the opinions thus published will be collected and republished in the Year Books of the Association.

The Library

SIDNEY B. HILL, *Librarian*

LIST OF PUBLICATIONS PRESENTED BY AUTHOR-MEMBERS DURING 1955

The reward for doing a good deed
is an opportunity to do another.
PROVERB

By their thoughtfulness in contributing copies of their writings, the author-members have helped to strengthen the holdings of the library in their respective subjects.

In connection with the issuing of this annual list, an appeal is appended of books wanted to serve as a reminder that our special collections of biography, legal history, philosophy, political science and public law, crime and criminal administration is in need to be refreshed with both old and new books. It is hoped that members when weeding out their personal libraries will donate their unwanted books to the library's collection or better still after you have read and reread that latest purchase from your favorite book store, why not earmark it for the library before the dust accumulates.

Abrams, Charles. Forbidden neighbors. New York, Harper. 1955. 404p.

Benson, Frederick S. Let's get together; a discussion of negligence litigation and related problems. 1954. 26 N.Y.S. Bar Bull. 300–314.

Botein, Bernard. The civil courts. 1955. 12 Off the Agenda. 4–6.

Breitel, Charles D. Know your courts. 1955. 12 Off the Agenda. 1–3.

Cahn, Edmond N. The moral decision. Bloomington, U. of Indiana Press. 1955. 342p.

Cheatham, Elliot E. Cases and materials on the legal profession. Brooklyn, The Foundation Press. 1955. 585p.

Clark, Grenville. Peace through disarmament and charter revision—detailed proposals for revision of the United Nations Charter. 1953. 149p.

Clay, Henry J. Aspects of settling claims under the Yugoslav Claims Agreement of 1948. 43 Geo. L. J. 582–614.

Coudert, Frederic R. A half century of international problems: a lawyer's view. New York, Columbia Univ. Press. 1954. 352p.

Darrell, Norris. The internal revenue code of 1954; a striking example of the legislative process in action. To be published in Major Tax Problems of 1955, Proceedings of the Tax Institute of the University of Southern California, School of Law. Albany, M. Bender & Co. 1955.

Diamond, Sidney A. Antitrust problems of fair trading. 1955. 1 Antitrust Bull. 97–124.

Domke, Martin. "Piercing the corporate veil" in the law of economic warfare. 1955. Wisc. L. Rev. 77–90.

Domke, Martin. The United Nations draft convention on restrictive business practices. 1955. 4 Int'l and Comp. L. Quart. 129–140.

Doroghi, Ervin. Grounds for divorce in European countries. New York, New School for Social Research, 1955. 51p.

Eder, Phanor J. El fideicomiso (trust) en el derecho comparado (especialmente Americano) Buenos Aires, Arayú. 1954. 152p.

Ekman, Sheldon V. Tax consequences of tenancies by the entirety and joint tenancies. Reprint of a lecture delivered during the 13th Annual Institute on Federal Taxation, November 3–12, 1954. New York, M. Bender & Co. 1955.

Ernst, Morris L. The lawyer's role in modern society: the proposal. A round table discussion. 1955. 4 J Public Law 1–5.

Fallon, Perlie P. Contract and life insurance. 1954. 59 Dick. L. Rev. 40–56.

Franco, Jose Justin. Leyes de matrimonio, separacion y divorcio en Los Estados Unidos. New York, Aztec Press. 1955. 72p.

Frankfurter, Felix. In memoriam; Robert H. Jackson. 1955. 68 Harvard Law Review. 937–998. 55 Columbia Law Review. 435–437.

Friedman, Milton R. Contracts and conveyances of real property. Chicago, Callaghan & Co. 1954. 425p.

Friedman, Wilbur H. and Michaelson, Arthur M. How to plan for the income of an estate. Reprinted from J. K. Lasser's Tax Techniques. Albany, M. Bender & Co. 1955. 1541–1578.

Friedman, Wilbur H. and Silbert, Gerald. Recapitalizations—exchanges of stock, securities and property of the same corporation under the Internal Revenue Code of 1954. Reprinted from the Proceeding of the Thirteenth Annual Institute on Federal Taxation, N.Y.U. Albany, M. Bender & Co. 1955. 533–547.

Gornick, Alan L. Big taxes; a challenge and opportunity for progressive management. An address delivered before The American Management Association Briefing Session. New York City, August 19–20, 1954. 24p.

Gornick, Alan L. The Michigan business tax receipts tax—its basis and economic theory. An address delivered before the Univ. of Michigan Law School Institute. Ann Arbor, July 30, 1953. 24p.

Greenfield, Harvey. How does the new tax law affect the investor? Reprinted from Investor, Sept. 1954 issue.

Hallett, James B. Extra-territorial effect of state regulatory laws: some 1955 comments. Paper read before The Assn. of Life Insurance Counsel, White Sulphur Springs, W. Virginia. May 9, 1955.

Hazard, John N. Soviet commentators re-evaluate the policies of criminal law. 1955 Columbia Law Review. 772–794.

Hehmeyer, Alexander. Opportunities in the Gold Coast. New York, Richardson Wood & Co. 1955.105p.

Henn, Harry G. "Magazine rights"—a division of indivisable copyright. 1955. 40 Cornell L. Q. 411–474.

Hyde, James N. What the United Nations is, and how it operates. In the US Stake in the UN. New York, Columbia University School of Business. 1954. 139p.

Joseph, Franz Martin. Death tax treaties: a comparison of basic provisions. Reprint of a lecture delivered during the 13th Annual Institute on Federal Taxation, November 3–12, 1954. New York, M. Bender & Co. 1955.

Klots, Allen T. The Selection of Judges and the short ballot. 1955. 38 J Am. Judicature Society. 134–143.

Klots, Allen T. Specialized courts. 1955. 12 Off the Agenda. 7–9.

Knapp, Whitman. The criminal courts. 1955. 12 Off the Agenda. 6–7.

Kuper, Theodore Fred. Collecting Monticello. 1955. 7 Manuscripts. No. 4.

Kupferman, Theodore R. Rights in new media. 1954. 19 Law and Contemporary Problems. 172–183.

Kutz, I. Henry. Transactions between related taxpayers. Reprint of a lecture delivered at the 13th Annual Institute on Federal Taxation, November 3–12, 1954. New York, M. Bender & Co. 1955.

O'Brian, John Lord. National security and individual freedom. Cambridge, Mass., Harvard U. Press. 1955. 84p.

Parra, Francisco J. Diplomacia Venezolana. New York, Las Americas Publishing Co. 1952. 60 p.

Paul, Randolph E. History of taxation in the United States. In the History and Philosophy of Taxation, a conference held at the College of William and Mary, April 15, 1955. Richmond, Va. William Byrd Press, 1955. 5–16.

Peck, David W. The Greer case. New York, Simon and Schuster. 1955. 209p.

Ploscowe, Morris. The truth about divorce. New York, Hawthorne Books, Inc. 1955. 315p.

Reeves, William Harvey. Is confiscation of enemy assets in the national interest of the United States? 1954. 40 Va. L. Rev. 1029–1060.

Richland, W. Bernard. Constitutional city home rule in New York. 1955. 55 Columbia L. Rev. 598–629.

Rothschild, V. Henry. Deferred compensation for executives. 1955. 33 Harvard Business Review. 89–102.

Rudy, Stephen J. Patent asset evaluation. 1955. 42p. mimeo.

Sereni, Angelo Piero. Principi generali di diritto e processo internazionale. 1955. 38 Rivista di Diritto Internazionale. 7–98.

Spingarn, Arthur B. Legal and protective measures with emphasis on social hygiene. New York, N.Y. Tuberculosis and Health Assn. 1950. 28p.

Steefel, Ernest C. Das deutsch–amerikanische Doppelbesteuerungsabkommen. 1954.

Taylor, Telford. Grand inquest: the story of the Congressional investigations. New York, Simon & Schuster. 1955. 358p.

Tweed, Harrison. Proposed reorganization of the courts. 1955. 12 Off the Agenda. 10–11.

Vanderbilt, Arthur T. Clearing congested calendars. 1954. 14 NACCA L. 236–237.

Vanderbilt, Arthur T. The courts, the public and the Bar. Text of lecture delivered at the N.Y. County Law. Assn. New York, Feb. 16, 1954. Reprinted by the Association. 15p.

Vanderbilt, Arthur T. The record of the New Jersey Courts in the sixth year under the Constitution of 1947. 1955. 9 Rutgers L. Rev. 489–496.

Wehle, Louis B. Review of The Public Corporation, edited by W. Friedmann. 1955. 55 Col. L. Rev. 256–160.

Wolfram, Leonard. Guilt without guilty intent–strict liability food laws. 1955. 10 Food Drug Cosmetic L. J. 355–372.

WANTED BOOKS FOR THE LIBRARY

Cardozo, Benjamin N. The nature of the judicial process. New Haven, Yale, 1928.

Cardozo, Benjamin N. The paradoxes of legal science. N.Y., Columbia U., 1928.

Cardozo, Benjamin N. What medicine can do for law. N.Y., Harper, 1930.

Holzman, Robert S. Stormy Ben Butler: biography of the famous Civil War general and Massachusetts lawyer. N.Y., Macmillan Co. 1954.

Houts, Marshall. From gun to gavel. N.Y., William Morrow & Co. 1954.

Huie, William B. The trial of Ruby McCollum. N.Y., Duell, Sloan & Pierce. 1954.

Kelly, A. H. and Harbison, W. A. The American Constitution, its origins and development. Rev. ed. N.Y., W. W. Norton & Co., Inc. 1955

Laski, Harold J. The American presidency, an interpretation. N.Y. & Lond. 1940.

Laski, Harold J. Studies in law and politics. New Haven, 1932.

Marson, Martin. The Private Diary of a public servant. N.Y., MacMillan Co. 1955.

Partridge, Bellamy. Ainsley Case; one of the true cases of the country lawyer of upstate New York whose memoirs have been read so widely. N.Y., Random House, Inc. 1955.

Pound, Roscoe. Law and morals. 2d ed. 1926.

Pound, Roscoe. Organization of courts. Boston, Little Brown, 1940.

Stevenson, Adlai. Call to greatness. N.Y., Harper & Bros. 1954.

Zilboorg, Gregory. The Psychology of the criminal act and punishment. N.Y., Harcourt Brace & Co. 1954.